IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 853 305

THE BALTIMORE AND OHIO RAILROAD COMPANY, A CORPORATION, PETITIONER,

vs.

THE CITY OF PARKERSBURG, A MUNICIPAL CORPORATION, RESPONDENT.

UPON MOTION AND PETITION FOR WRIT OF CERTIORARI DIRECTED TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FRANCIS P. MOATS, and
ROBERT B. McDOUGLE,
Attorneys for Respondent.

GLOBE PRINTING & BINDING CO., PARKERSBURG, W. VA.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE

Has the City of Parkersburg forever lost its right to collect municipal taxes from the property of the Baltimore & Ohio Railroad Company located within its limits? The Railroad Company affirms this contention on the following state of facts:

In 1851 the North Western Virginia Railroad Company was incorporated by act of the general assembly of Virginia to construct a line of railroad extending from Parkersburg on the Ohio River eastward to Grafton on the main line of the Baltimore & Ohio Railroad. The Town of Parkersburg subscribed $50,000 in aid of construction and in 1855 among other conveyances and franchises granted to the Railroad perpetual immunity from all town taxes and assessments. In 1865 all the property rights and franchises of the North Western Virginia Rail-

road Company were sold under mortgage and were purchased by the Parkersburg Branch Railroad Company, a creature of the Baltimore & Ohio Railroad Company; and the North Western Virginia Railroad Company was dissolved by operation of law and went out of existence. The tax immunity so granted in 1855 was acquiesced in by the municipal authorities from 1855 to 1894, at which time the City attempted to collect from the property of the Railroad Company the same municipal taxes that it collected from all other property within its limits. This suit was brought by the Baltimore & Ohio Railroad Company to enjoin the City from collecting such taxes for the years 1893 and 1894. A demurrer of the City was interposed to the bills of complaint, which were overruled in 1897, and the cause was permitted by both parties to the controversy to remain on the trial docket of the court without any progress being made looking to a final adjudication until 1922. In 1923 the District Court struck from the record the answers of the City which had been filed after the demurrer was overruled, perpetuated the injunctions awarded against the City, and entered final decree in favor of the Railroad Company against the City. From this judgment the City prosecuted its appeal to the Circuit Court of Appeals for the Fourth Circuit which resulted, by a divided court, in dismissing the bills of complaint of the Railroad Company and dissolving the injunctions.

The Baltimore & Ohio Railroad Company has filed its petition and brief for writ of certiorari directed to the Circuit Court of Appeals looking to having reviewed and determined its final judgment.

ARGUMENT.

It is submitted that the judgment of the Circuit Court of Appeals in this cause is clearly right, because,

FIRST: CONTRACT OF EXEMPTION OF JUNE 8, 1855 ENTERED INTO BETWEEN THE TOWN OF PARKERSBURG AND THE NORTH WESTERN VIRGINIA RAILROAD COMPANY WAS ULTRA VIRES AND VOID.

On this point the opinion of Judge Woods is referred to for a clear and concise statement of the law and authorities on the subject.

SECOND: EVEN IF THE CONTRACT OF EXEMPTION HAD BEEN VALID IT DID NOT PASS BY FORECLOSURE AND SALE, BUT BECAME EXTINCT ON THE DISSOLUTION OF THE NORTH WESTERN VIRGINIA RAILROAD COMPANY, THE GRANTEE.

This point was also expressly treated by Judge Woods in his opinion. In addition to what he has said in his opinion on this subject, it may be said in addition that this foreclosure sale was made pursuant to the provisions of Section 28 and 29 of Chapter 61 of the Code of Virginia, 1860. These identical provisions were construed in considering this identical question in the case of C. & O. Railroad Company vs. Miller, 114 U. S. 176; 29 L. Ed. 120. In that case it was held expressly that immunity from taxation did not pass under a foreclosure sale made pursuant to the provisions of these sections.

THIRD: THE ORIGINAL ACT BEING VOID, BECAUSE ULTRA VIRES, IT COULD NOT BE MADE VALID OR EFFECTIVE BY SUBSEQUENT ACTS OF INDULGENCE, ACQUIESCENCE OR RATIFICATION.

In addition to what Judge Woods has said on this subject it may be stated that an act which is ultra vires in its inception cannot be made valid by ratification, or acquiescence, which is but an implied ratification in the

absence of power to have ~~purported~~ performed the original act. In the absence of such authority, which it is admitted did not exist, all subsequent acts of ratification, either express or implied, were just as invalid as the original act, which they purport to support. Loan Company vs. Topeka, 20 Wall. 655; 22 L. Ed. 461.

The agents of the municipality when they attempted to perform an act or to ratify an act which was not within the scope of the powers delegated to them, were not acting for the municipality and their actions in this respect were no more effective than if made as private individuals.

FOURTH: THE NEGLECT OF THE PLAINTIFF, THE ACTOR, TO PROSECUTE ITS SUIT TO FINAL CONCLUSION CANNOT BE ATTRIBUTED AS LACHES ON THE PART OF THE CITY.

It is contended that as Judge Goff overruled the demurrer of the City in 1897, that this was a final adjudication of the merits in view of the fact that both parties permitted the cause to remain on the trial docket of the court for many years without further progress being urged by either looking to its final conclusion. No injury is alleged to have resulted on account of this delay, and none is conceivable except the possible loss which the City has sustained by reason of its failure to receive taxes which might otherwise have accrued. With every year of delay the Railroad stood to gain an additional year of immunity. The record is silent on the question of responsibility for this delay but as to whose interest it was to have the conclusion deferred the presumption is obvious. In the absence of injury the doctrine of laches may not be invoked, and when injury results the doctrine inures only for the benefit of the injured party.

It is not necessary to repeat what Judge Woods has said in disposing of this contention.

FIFTH: WHAT EQUITIES ARE DISCLOSED THAT REQUIRE ADJUSTMENT?

It is contended that it would be inequitable to permit the City to retain the property it has received from the Railroad Company in consideration for this grant of immunity, and great stress is laid upon the benefits the City has received from this property It is disclosed by the record that the City received only two items of p operty which could in anywise be construed to be involved in this grant of immunity. No specific consideration is claimed for this grant and none is expressed in the grant. The grant was involved in a contract wherein the City conveyed to the North Western Virginia Railroad Company valuable land and franchises in addition to the grant of immunity. In this conveyance the Railroad Company *quit claimed all its doubtful right, title and interest, with special warranty only,* in and to a water frontage on the Ohio River and incumbered this frontage with a restriction to a specific use which would inure to the advantage of the Railroad Company, limited the application of any revenue that might be derived therefrom to a purpose which would promote the interests of the Railroad, and required the City to maintain it and keep it in repair. As to this the railroad company did not part with an asset; it merely transferred a liability. Petitioner omits to inform the Court that by this same conveyance the City conveyed to the Railroad Company a water frontage of equal extent on the Little Kanawha River, for its sole and exclusive use and occupation, and which the Railroad to this date enjoys. It is alleged in argument that the City has received revenues from the Ohio River frontage in excess of all taxes which could have accrued to the City from the property of the Railroad. There is nothing in the record to warrant this statement and as a matter of fact it is without foundation. The City has always owned a wharf at

the mouth of the Little Kanawha River which has never been involved in any grant made to or from any Railroad Company, and it has been from this that the City has received any revenues derived from wharfage. Other than the release of the Railroad to the City of its doubtful claim to the Ohio River frontage the only other consideration moving from the Railroad to the City contained in the grant which involved this tax immunity, was the agreement of the Railroad Company to pave or macadamize the landing in front of the City wharf, which was evidently to its peculiar advantage to do and to construct a landing of like nature sixty feet in width at the foot of Court Street to the Ohio River. (Record, p. 27). Attention is called particularly to this sixty foot landing at the foot of Court Street, for the reason that the transactions with reference to it are alleged to be the main inducement for the grant of immunity. The building of this landing was in the first instance the liability of the North Western Virginia Railroad, and was to be completed within three years from 1855. The landing was never built and it follows that this liability was not transmitted to the purchaser of the property of the North Western Virginia Railroad at the foreclosure sale. By agreement dated May 10, 1867, (record, p. 32) the City granted to the Parkersburg Branch Railroad Company, the successor of the North Western Virginia Railroad Company, extremely valuable franchises involving the exclusive use of public property and practically the total appropriation of one of its main streets. It also appropriated $15,000 for the purpose of widening this public street in order to accommodate the needs of the Railroad. The sole consideration named in this agreement for these valuable grants, franchises and appropriations, was the agreement of the Parkersburg Branch Railroad Company to "without unnecessary delay, proceed to the construction of the wharf at the foot of Court Street," and which was to be completed before the 1st day of December, 1868. Yet by the 15th day of March,

1870, the building of the wharf had not been begun and the Railroad Company being in need of additional franchises these were granted on that day (record, p. 37) and the City released the Railroad Company from the construction of a wharf at the foot of Third Street, in consideration of which grants and release the Railroad Company paid to the City the sum of $7,500, which was one-half of the $15,000 theretofore appropriated by the City for the use and accommodation of the Railroad. These transactions are the only basis for the contention of the Railroad Company that the City received and is enjoying properties and revenue of great value in consideration of the grant of immunity from taxation.

From this state of facts it is argued on behalf of the Railroad that the original status of the parties be restored and that the City be compelled to make restitution of all it received, before it can be heard in defense. We cannot believe that in making this contention the petitioner has fairly stated all that such a process implies. The mutuality of such a restitution is ignored as is also the duty of the actor to make this first proffer. In considering all that the restored status implies, it can be fairly assumed that the City would not be hostile to the proposition. But it is obvious that the status quo cannot be restored. It is just as evident that it would be inequitable to compel the Railroad to relinquish all the land, franchises and money granted to it by the City in exchange for the doubtful title to an incumbered, unproductive river bank, and $7,500.00 in cash. The grant of immunity may be ignored and there still remains scant consideration to support the liberal grants of the City, and it is unfortunate in considering these matters that the record does not disclose the situation as it exists today.

Equally as unsound is the contention of the ~~City~~ Company that the grant of this water front in 1855 and the payment of

this $7500.00 in 1870 constitute a commutation of taxes due the City. Even had this grant and payment been the sole consideration for this immunity the act could not be so construed. To so construe it is to hold that perpetual immunity from taxation was a lawful subject of barter by the agents of the municipality, upon terms which would not permit of possible adjustment to meet changed conditions and circumstances. No instance of such a construction can be shown. But it is argued that the City should account for the alleged profits which have accrued to it from the grants of the Railroad. This argument loses its force when it is recalled that the Railroad derived land and franchises vital to its business as part consideration, at least, for whatever of value it may have contributed to the City. If the Railroad made grants to the City these same grants involved conveyances from the City to the Railroad. If there were mutual conveyances let there be also mutual accountings.

"It is not a question of presence or absence of a valuable consideration to support tax exemptions against which such constitutional provisions are directed. There has seldom, if ever, arisen a case of tax exemption where such a consideration was not supposed by the taxing authority to exist at the time, and a supposedly sufficient consideration. But the evil of allowing such a power to exist, even in the legislature, is so manifest that the rules of construction applicable to every alleged tax relinquishment, above adverted to, and the constitutional inhibitions which are now in force in Virginia against the exercise of such a power, have been adopted, and have their foundation deep seated in principles which are immutable under our form of government."

City of Richmond v. Va. Ry. & Power Co. 98 S. E. 691.

The City of Parkersburg has had but little opportun-

ity to present its defense in this case. Its answer has been stricken from the records; but it now earnestly disclaims the argument of bad faith attributed to it in its endeavor to secure equal and uniform taxation on all property within its limits. It is not seeking to impose a burden that has not been and is not being borne by all other property. The problem presented by this situation today is not a question of expediency to be solved by balancing the ambitions of a pioneer village on the one hand against the foresight of the builders of a railroad on the other, such as obtained in 1855. It may be that the mutual advantages then supposed to result from the arrangement then made justified the act, although prohibited by law, so long as conditions were not materially changed, and these changes were evidently not fully conceived by the agents who then represented the town. But these changes have come. It may with propriety be assumed that today there is a larger question presented in this controversy than the mere problem of strict, literal justice to the Baltimore & Ohio Railroad Company. The motives that prompt the agents of the City to attempt to avoid a situation that is fast becoming intolerable are derived from a sense of justice to twenty-five thousand people and many millions of dollars of property within the limits of the City. Even though the property of the railroad has been immune from taxation this does not mean that the burden was obliterated; it means merely that the burden has been shifted to the shoulders of others. The light of the times which prevailed in 1855 is not illuminating today, and the demands of public policy do not always result in dealing out old fashioned justice to the individual.

It is earnestly submitted for the reasons herein stated

and for the additional reasons stated in the opinion of Judge Woods of the Circuit Court of Appeals that the judgment of the Circuit Court of Appeals was clearly right, and the prayer of the petitioner should be denied.

Respectfully submitted,
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ROBERT B. McDOUGLE,
Attorneys for Respondent.

BRIEF ON BEHALF OF APPELLEE

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 305.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Appellant and Petitioner,

v.

THE CITY OF PARKERSBURG,
Appellee and Respondent.

UPON APPEAL FROM, AND PETITION FOR WRIT OF CERTIORARI TO, THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924.

No. 305.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
Appellant and Petitioner,

v.

THE CITY OF PARKERSBURG,
Appellee and Respondent.

UPON APPEAL FROM, AND PETITION FOR WRIT OF CERTIORARI TO, THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF ON BEHALF OF APPELLEE.

PRELIMINARY STATEMENT.

On April 10, 1894, the above entitled action was brought by The Baltimore and Ohio Railroad Company, the appellant. From the bill of complaint it appears that the purpose of the suit was to enjoin the City of Parkersburg, and John W. Dudley, the then Sheriff of Wood County, West Virginia, from collecting municipal taxes for the year 1893 amounting to One Thousand and Forty-two Dollars and Seventy-three ($1042.73) cents assessed by the Auditor of the State of West Virginia on certain railroad property in Parkersburg, and by said Auditor certified to said Sheriff for collection. (Printed Record, page 1.)

Said Sheriff, at the direction of counsel for the Baltimore and Ohio Railroad Company, had levied on two railroad engines, Nos. 501 and 748, "of great value, to-wit: of the value of Twenty Thousand ($20,000.00) Dollars." (Printed record, pages 7 and 84.)

Upon said bill the court issued a temporary injunction ex parte, the injunction order (Printed record, page 30) being in part as follows:

"This day came the said plaintiffs by their counsel, and here exhibited their certain bill of complaint, verified by affidavit, against the said Defendants, and pray an injunction to restrain the defendants from all proceedings by way of levy upon, seizure or sale of property of the said plaintiffs, or otherwise to collect certain taxes in the said bill mentioned and claimed to be due to the said City of Parkersburg for the year 1893 for use and purposes of said city from the said plaintiffs for taxes assessed as in the bill mentioned * * * And upon the further motion of the said plaintiffs, and for reasons appearing to the Court, it is further ordered that upon due service of such subpoena in chancery and notification, and also a copy of this order upon the said defendants, the said defendants shall be and stand, and they are hereby temporarily enjoined and prohibited from all proceedings by way of levy upon, seizure or sale of property of the plaintiffs, or otherwise to collect the said taxes so claimed as aforesaid for the said year 1893 or any part thereof, this temporary injunction to continue until the said 15th day of the next term of this Court at Parkersburg and until the hearing and determination of said application for said injunction as aforesaid."

On May 7, 1894, the City demurred to said bill (Printed record, page 3), and filed its Answer on June 14, 1894, (Printed record, page 32).

On June 20, 1894, the B. and O. Railroad Company filed Exceptions Nos. 1 and 2 to the Answer of the City

of Parkersburg (Printed record, pages 86 and 90), the exceptant insisting that certain allegations contained in said answer are impertinent and irrelevant, "and humbly insists that said impertinent matters may be expunged from said answer; and that the said defendant may be compelled to put in a full and proper and pertinent answer to said bill of complaint."

John W. Dudley, Sheriff, filed his separate answer on June 27, 1894. (Printed record, page 84.)

On August 16, 1895, the Railroad Company filed an amended and supplemental bill (Printed record, page 91) from which it appears that the City had caused to be placed in said sheriff's hands for collection, municipal taxes against certain railroad property, the amount of said tax being One Thousand Seven Hundred and Eighty-six Dollars and five cents, ($1786.05) and that said Sheriff under the direction of said City had levied upon "one locomotive engine number 439 of great value, to-wit: Ten Thousand ($10,000.00) Dollars, the purpose of said Bill being in effect to enjoin said City and Sheriff from the collection of said municipal taxes for the year 1894.

Thereupon an injunction order (Printed record, page 100) was entered, which was in part as follows:

"On this 16th day of August, 1895, came the said plaintiff by its counsel, and exhibited a certain amended and supplemental bill of complaint verified by affidavit and prays an injunction against the defendants to restrain them from proceeding by way of levy upon or seizure or sale of the property of the said plaintiff or otherwise to collect certain taxes in the said bill mentioned and claimed to be due to the City of Parkersburg for the year 1894 from the plaintiff for taxes assessed as in the bill mentioned for said year 1894. * * * * * And upon the

further motion of the said plaintiff, and for reasons appearing to the court, it is further ordered that upon due service of such subpoena in chancery and notification and a copy of this order shall be sufficient notification and said defendants shall be and stand, and they are to be temporarily enjoined and prohibited from proceeding by way of levy upon or seizure and sale of the property of the said plaintiff or otherwise, to collect the said taxes for the year 1894 or any part thereof, and, this temporary injunction shall be and continue until the said 2nd day of October, 1895, and until the hearing and determination of said application for said injunction."

On September 3, 1895, the City demurred to said amended and supplemental Bill. (Printed record, page 101.)

On October 2, 1895, the City moved the Court "to dissolve and vacate the restraining orders and injunctions," and, saving all rights to insist upon the demurrers theretofore filed, tendered its answer and asked that it be considered upon said motions. Thereupon the case was submitted to the court upon said motions and demurrers. (Printed record, page 103.)

An order was entered on July 13, 1897, overruling said demurrers, and filing the separate answers of said defendants to the original bill, and giving leave to file answers to the amended and supplemental bill within 30 days (Printed record, page 104), which said last mentioned answer on behalf of the City was filed on August 11, 1897. (Printed record, page 104.)

On June 9, 1920, an order was made in the District Court striking the cause from the docket. On January 17, 1921, on motion, an order (Printed record, page 106) was made restoring the cause to the docket, the order reciting that it appeared to the court "from the last order

entered in said cause that the same was heretofore submitted to the Court upon the motion of the plaintiff to perpetuate a temporary injunction theretofore granted, and upon the motion of the defendant, the City of Parkersburg, to dissolve said temporary injunction, and that neither of said motions, so far as the record discloses, have been disposed of by the Court."

On June 3, 1922, an order (Printed record, page 107) was entered showing that:—

"The said The City of Parkersburg by counsel moved that this cause be set for hearing upon the exceptions of the said plaintiff to the separate answer of the said The City of Parkersburg to the bills of complaint, which said exceptions were filed herein on the 22nd day of June, 1894, and the 2nd day of October, 1895, to which motion the said plaintiff objected, and, without waiving the said exceptions or its rights under the present equity rules to move to strike out from the said answers the portions thereof referred to in said exceptions, moved the court to strike out the said answers, said objection and said motion being based upon the ground that the said The City of Parkersburg has acquiesced in the injunctions awarded herein on the 10th day of April, 1894, and the 16th day of August, 1895, and through the lapse of more than a quarter of a century has failed to take any action looking to the dissolution of the said injunctions, and has long since abandoned its claim for the taxes, and the collection of which was restrained by said injunctions, and has failed to do or offer to do equity herein, and for other reasons appearing in the record."

On January 10, 1923, the City of Parkersburg again moved to dismiss the suit and to dissolve the preliminary injunctions. (Printed record, page 108).

On February 7, 1923, (Printed record, page 109) a final decree was entered from which it appears: (1) That the Court sustained the Railroad Company's objection to

the motion entered therein on the 3rd day of June, 1922, that this cause be set for hearing upon the exceptions of the Railroad Company to the separate answers of the City of Parkersburg to the bills of complaint, which said exceptions were filed herein on the 22nd day of June, 1894, and the 2nd day of October, 1895, and declined to set the cause for hearing upon said exceptions; (2) The Court sustained the Railroad Company's motion to strike out the separate answers of the City of Parkersburg; (3) the Court overruled the City's motion entered January 10, 1923, to dismiss the suit and to dissolve the preliminary injunctions.

It further appears from said order that upon the motion of the Railroad Company, the preliminary injunctions were made permanent.

February 9, 1923, the District Court entered an order allowing an appeal and supersedeas upon the petition of the City of Parkersburg.

On May 22, 1923, the cause came on to be heard before the Circuit Court of Appeals for the Fourth Circuit and was argued by counsel and submitted (Printed record, page 160).

On December 17, 1923, the Circuit Court decreed "that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Northern District of West Virginia, at Parkersburg, with directions to dismiss the bill in accordance with the opinion of this Court filed herein." (Printed record, page 193).

On February 13, 1924, the Railroad Company's petition for an appeal to this court was allowed. (Printed record, page 200).

STATEMENT OF FACT.

The undisputed facts in this case as set out in the bills and exhibits, are as follows:—

The Town of Parkersburg was created by an act of the General Assembly of Virginia passed January 22, 1820.

The North Western Virginia Railroad Company was incorporated under a charter of Virginia in 1850. (Acts of 1850-51, pages 69-70).

The Town of Parkersburg subscribed Fifty Thousand ($50,000.00) Dollars to the stock of the North Western Virginia Railroad Company, and paid said subscription through bonds which were paid by taxes levied upon its citizens and property liable to taxation. The Town received nothing whatever in return in stock dividends, or other income. (Printed record, page 33.)

March 21, 1853 t,he North Western Virginia Railroad Company executed two mortgages, one to the City of Baltimore and one to the Baltimore and Ohio Railroad Company. (Printed record, page 9 and page 12.)

The description of the property granted in each instrument, was exactly the same, being as follows: *"All the property of the North Western Virginia Railroad Company of every kind, nature and description the same may be, as well that which they may at this time actually hold as that which in the prosecution, completion, stocking and working of the said Railroad shall be accumulated thereon."* (Printed record, page 11 and page 14.)

By deed dated March 13, 1854, John J. Jackson and others conveyed to the North Western Virginia Railroad

Company all the water frontage in the Town of Parkersburg between Ohio Street and the Ohio River and between Kanawha (First) Street and the Little Kanawha Rivers, from Washington (Sixth) Street on the Ohio River to Green Street on the Little Kanawha River, except the public wharf and landing at the junction of the two rivers, and also excepting the river frontage from the line of Second Street, on the Ohio River, down to the public wharf which the railroad was not to occupy except for wharfing purposes. (Printed record, page 15).

Apparently the North Western Virginia Railroad Company was not satisfied with the title to said land so obtained. An ordinance passed by the Council of the Town of Parkersburg at a special meeting, June 8, 1855, (Printed record, page 18) shows that "the committee appointed to confer with the Railroad Company and instructed at the last meeting to close a contract with the said company in accordance with propositions made by the President of said company as set forth in the following resolutions which were offered by said committee and unanimously adopted in order to be made a part of the minutes of the meeting.

"Resolved, that the President be and he is hereby authorized and directed to execute and deliver to the North Western Virginia Railroad Company for and on behalf of the President, Recorder and Trustees of the Town of Parkersburg a deed or deeds to be approved by the Council of the Town and to be executed also on the part of the said company to carry into full effect the following stipulations which have been assented to by the President of the Company subject to the ratification of his Board, and are hereby assented to by this council."

Thereupon, on said 8th day of June, 1855, the President of the Town on behalf of the President, Recorder and

Trustees of the Town of Parkersburg and the President of the North Western Virginia Railroad Company executed a certain deed.

This deed is the very foundation and bedrock of this controversy. (Printed record, page 20.)

Under this deed the Railroad Company was to receive from the town the right to the free and exclusive use and occupation for railroad purposes of the lands, banks, shores, and water rights within described boundaries, and "the right to lay and use railroad tracks with suitable switches and turnouts along and across such of the streets and alleys of the said town as they may deem necessary to connect their stations and other improvements." These lands, banks and shores are between the Little Kanawha River and the Town. For years the company's only passenger station was located thereon, and for approximately half a century was the location of its freight depot. It still occupies all the real estate mentioned in the deed. These rights were subject to the obligation of the railroad company to keep the streets open for traffic, to grade and keep in repair the portion of the streets between sidewalks and tracks, and to construct and maintain a certain culvert. All the property of the railroad company then owned, or thereafter acquired, used for railroad purposes, was to be "free from all town taxes, assessments and charges." The consideration to the town was the grant of all the right, title and interest of the railroad company in lands conveyed to it by Jackson and others, to be used by the town exclusively for wharfage purposes, the construction of two wharfs on the Ohio River, one of them at the foot of Court Street, subject to the condition that rates for wharfage should not exceed the lowest rate at certain cities named, except by consent of the railroad company, and that the railroad company should have free wharfage.

At a regular meeting of the Council of the Town on July 13, 1855, "The President, on the part of the committee appointed at a special meeting of the Board, June 7, to close a contract with the North Western Virginia Railroad Company, in accordance with propositions made by the President of said town *for the adjustment of the conflicting titles to the Ohio and Kanawha River banks in front of said town*, reported that a deed had been made and executed by the President on the part of the Council, and by Thomas Swan, President of said Railroad Company on the part of said company, *each conveying to the other their interest in certain portions of said river banks*, and other rights and privileges as set out in the resolutions adopted at a special meeting of the Board June 8, 1855, which deed is of record in the Clerk's office of the County Court of Wood County." (Printed record, page 22.)

It is claimed by appellant's bill of complaint "that the President, Recorder and Trustees of the town of Parkersburg, at the date of the said deed of June 8, 1855, and contract, had full power and authority to make said deed and covenants therein, in consideration of the terms and conditions and privileges therein stated, whereby the said North Western Virginia Railroad Company's lots and property in the Town of Parkersburg should be exempt from all town taxes and assessments." (Printed record, page 4.)

In February 1865, the two mortgages executed by the North Western Virginia Railroad Company, heretofore referred to, were foreclosed. All of the property of the North Western Virginia Railroad Company was sold by decree of court, the Baltimore and Ohio Railroad Company being the purchaser. By this sale, the whole of the investment of the Town of Parkersburg of Fifty Thousand ($50,000.00) Dollars in the North Western Virginia Railroad Company was lost. By virtue of a statute of Virginia

(sections 28 and 29, of chapter 61, of the Code of 1860), the Baltimore and Ohio Railroad Company, as purchaser, declared that the property should become a corporation, by the name of the "Parkersburg Branch Railroad Company." (Printed record, page 5.)

It is claimed by the bill of complaint, that the alleged exemption created by the deed and ordinance of June 8, 1855, passed, by virtue of the sale under the mortgages, to the Parkersburg Branch Railroad Company. (Printed record, page 6.)

The bill of complaint says that it was the intention of the North Western Virginia Railroad Company to make Parkersburg and the Ohio River its western terminus. This was the reason for their anxiety to control the water front of the city, and the probable reason for the indulgence which the city extended. But the Parkersburg Branch Railroad Company no sooner came into possession of the property of the North Western Virginia Railroad Company than the plans of its predecessor in this respect were changed. It immediately began preparations for a western extension by means of a bridge across the Ohio, which would render worthless the river frontage and shipping facilities so valuable in the plans of its predecessor. As an incident of this change of plan, Parkersburg would become a mere way station on a through line instead of a terminus. Pursuant to this change of plan, the Parkersburg Branch needed additional streets, additional ground, additional franchises. It must have a street on which to locate the approach to the proposed bridge across the Ohio.

On May 30, 1865, (Printed record, page 23), and May 10, 1867, (Printed record, page 23), ordinances were passed declaring the ordinance of June 8, 1855, to be in full force and virtue, but making no special reference to the

attempted tax exemption. The ordinance of May 10, 1867, extended the Railroad's use of the streets in the city upon condition that the railroad company, in accordance with the agreement of June 8, 1855, with the North Western Virginia Railroad Company, should construct the wharf on Court Street to be the property of the city.

On March 15, 1870, in consideration of the payment of $7500, the railroad company was released from its obligation to build the wharf on Court Street.

The claim of the bill (Printed record, pages 6 and 7) is, that under all of these acts, contracts and ordinances, the N. W. Va. R. R. Co., was exempt from taxation; that the property of that company when it passed into the hands of P. B. R. R. Co,, was exempt by reason of the contracts theretofore made, and that the ordinances and contracts made between the City of Parkersburg and the P. B. R. R. Co., subsequent to the purchase, gave immunity and exemption from taxes directly to the P. B. R. R. Co., and that all of these transfers of property and payments of money were a commutation and a payment and a satisfaction to the City of Parkersburg THROUGHOUT ETERNITY; and estopped and prevented the city, not only from claiming any taxes as to property that came from the N. W. VA. R. R. Co., but as to any property that the P. B. R. R. Co., might acquire.

SPECIFICATIONS OF ERROR.

In connection with its petition for an appeal from the decree of the Circuit Court of Appeals entered on December 17, 1923, which petition was granted by said Court (Printed record, pages 195 and 196), and the cause brought here (Printed record, page 200), appellant made the following assignments of error, that it was error:—

I.

To reverse and set aside the decree entered on the 7th day of February, 1923, in favor of the Baltimore and Ohio Railroad Company in and by the District Court of the United States for the Northern District of West Virginia.

II.

To refuse to uphold and affirm the said decree entered by the District Court of the United States for the Northern District of West Virginia.

III.

To dismiss the bill and amended bill of the petitioner, filed in the said District Court; and to deny to the petitioner all relief in the premises.

IV.

To hold and to decide to be void and not binding upon the City of Parkersburg, the following contracts, records and deeds; that is to say:

(a) The ordinance of June 8, 1855, authorizing the execution of a deed between the Town of Parkersburg and the North Western Virginia Railroad Company, shown at page 18 of Printed record,

(b) The deed of that same date, June 8, 1855, (Printed record, page 20), between Parkersburg and the North Western Virginia Railroad Company whereby in consideration of the grants, conveyances, covenants and stipulations, the sum of one dollar, the town grants the use of certain portions of the lands, banks shores and other water rights, on certain conditions; and (Printed record, page

20) the town for like consideration grants and covenants with the Railroad Company that "all the property owned, used or occupied by the Company so long as same is used or appropriated by them to purposes connected with the business of the railroad, shall be free from all town taxes, assessments and charges. * * *". In consideration whereof, the Railroad Company grants and conveys to the Town valuable real estate set forth on page 27. The Company was required to construct a wharf along the Little Kanawha and Ohio Rivers, and three years thereafter construct a similar wharf for sixty feet on the Ohio River, to be owned by the City.

(c) The ordinance of April 10, 1865, (May 30, 1865?) by Section 3 thereof (page 23) reference is made to former ordinances and to "the agreement between Parkersburg and the North Western Virginia Railroad Company, dated June 8, 1855, and all other ordinances and parts of ordinances heretofore passed and accepted, are hereby declared to be in full force and binding on the City of Parkersburg, and the Parkersburg Branch Railroad Company as the successors of the former parties thereto."

(d) The ordinance of May 10, 1867 (page 23) which provided by Sec. 1, that the Parkersburg Branch Railroad Company—late North Western Virginia Railroad Company —are hereby authorized and empowered to construct and continue their railroad with single track, etc.

By Sec. 3, "the deed and agreement of June 8, 1855, and all other ordinances heretofore passed by Parkersburg and accepted by the North Western Virginia Railroad Co., are hereby declared in full force and binding on the City of Parkersburg and the Parkersburg Branch Railroad Company as successors respectively of the former parties thereto." (Printed record, page 24.)

(e) The ordinance of March 15, 1870, (page 27), authorizing the construction of bridge and approach across the Ohio River, and providing that the payment by the Parkersburg Branch Railroad Company to the City of seven thousand and five hundred dollars, shall be received in discharge of the requirement for building the wharf at the foot of Court Street on the Ohio River, as contained on the deed of 1855.

V.

To hold and to decide that upon the foreclosure of the mortgage of the North Western Virginia Railroad Company in 1865, that no right to any commutation of taxes, and no right or equity to any consideration paid therefor, passed to the purchaser.

VI.

To hold and to decide that the decree of the United States Circuit Court (now District Court), in 1897, overruling the demurrers and leaving the injunction in force, did not determine or settle the merits or principles of the cause, and did not sustain the validity of the deed and contracts.

VII.

To hold and to decide that the said City was not affected or estopped by its laches and conduct in recognizing and in performing the said deed and contracts from 1855 to 1894—a period of thirty-nine years, during all of which no claim to taxes had been asserted by the City, and to hold that the City was not affected or estopped by its subsequent acquiescence for twenty-five years additional in

the decree entered on the 13th day of July, 1897, in the District Court by the Honorable Nathan Goff, Judge of the Circuit Court, then sitting, whereby the demurrers interposed by the City were overruled, to the bill and amended bill of the plaintiff and appellant.

VIII.

To hold and decide to be null and void the contract of 1855 and the several ordinances made and passed by the City of Parkersburg in the years 1865, 1867 and 1870, confirming, ratifying and continuing in full force and binding upon the City and the Railroad Company, the covenants and provisions of the original ordinance and contract, and all other ordinances passed on that subject.

IX.

To hold and to decide that the action of the State and the City in assessing and levying taxes upon the property of the Railroad Company in 1893 and 1894, was not illegal and did not impair the obligation of the contract of 1855, and all subsequent ordinances and contracts in violation of Section 10 of Article I of the Constitution of the United States forbidding a State from passing any law impairing the obligation of contracts.

X.

In failing to hold and to decide that the Commutation Contract contained in the agreement and deed of the 8th day of June, 1855, was valid and binding when entered into, and that the general assessment laws of West Virginia, under the authority of which the assessment and levy complained of was made, impaired the obligation of that contract in violation of the terms of Sec. 10, Article I of the Constitution of the United States.

XI.

In failing to hold that the action of the city in holding and remaining in possession of the property and consideration paid to it under the agreement and deed of June 8, 1855, and subsequent ordinances, and at the same time assessing and levying taxes upon appellant's property, was a taking of appellant's property, and deprived appellant thereof without due process of law, and was a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States.

XII.

To hold that the contracts in suit were *ultra vires* and did not involve any moral turpitude, and at the same time to deny and refuse to require the city to reconvey the lands or account for any moneys or property received by it for commutation of taxes under said contracts.

FINAL ISSUES.

The above assigned errors may be grouped for the purpose of simplifying the argument into five fundamental questions which therefore become the main issues in the case. Thus:—

ERRORS I, II, III, IV, V, VIII
becomes ISSUE I: Has the City of Parkersburg lost the right to collect taxes on the property of the B. and O. R. R. Co., situated in the City of Parkersburg, and is said property perpetually free from City taxation by reason of exemption or commutation by a City ordinance of June 8, 1855, a contract with the City of same date and subsequent ratification thereof?

ERROR VI becomes
ISSUE II: Has the City of Parkersburg lost the right to collect taxes on the property of the B. and O. R. R. Co., situated in the City of Parkersburg, and is said property perpetually free from City taxation by reason of adjudication of July 13, 1897, that the attempted exemption or commutation was valid?

ERROR VII becomes
ISSUE III: Has the City of Parkersburg lost the right to collect taxes on the property of the B. and O. R. R. Co., situated in the City of Parkersburg, and is said property perpetually free from City taxation by reason of laches of the City in acquiescing in the assertion of the validity of the exemption or commutation from 1855 to 1893, and from 1897 to 1921?

ERRORS IX and X become
ISSUE IV: Was the action of the City in assessing and levying taxes upon the property of the Railroad Company in 1893 and 1894 illegal and did it impair the obligation of contract in violation of Section 10, Article I of the Federal Constitution?

ERRORS XI and XII become
ISSUE V: Was there any necessity for the City to offer to do equity?

ARGUMENT.

ISSUE I.

THE CITY OF PARKERSBURG DID NOT LOSE THE RIGHT TO COLLECT TAXES ON THE PROPERTY OF THE BALTIMORE AND OHIO RAILROAD COMPANY SITUATED IN THE CITY OF PARKERSBURG,

AND SAID PROPERTY IS NOT PERPETUALLY FREE FROM CITY TAXATION BY REASON OF EXEMPTION OR COMMUNTATION BY A CITY ORDINANCE OF JUNE 8, 1855, A CONTRACT WITH THE CITY OF THE SAME DATE AND SUBSEQUENT RATIFICATION THEREOF.

POINT I.

The contract of June 8, 1855, entered into between the Town of Parkersburg and the Northwestern Virginia Railroad Company in so far as it purported to exempt said Railroad Company's property from taxation, was ultra vires and void. (Printed record, pages 18 to 22).

A. Neither the original charter nor any amendments confers either directly or by implication, power to exempt property from taxation.

By an Act of the General Assembly of Virginia passed January 22, 1820, the Town was incorporated. Sections 2 and 3 of said Acts were as follows:

"Sec. 2. The President, Recorder and Trustees so elected, and their successors in office, shall be, and are hereby made a body politic and corporate, by the name of the President, Recorder and Trustees of the Town of Parkersburg, and by the name aforesaid, shall have perpetual succession, with capacity to purchase, receive, possess and convey any real or personal estate for the use of said town and shall be capable in law to sue and be sued, plead and be impleaded, in any action or suit, before any of the courts of this Commonwealth, or elsewhere; and if any action or suit, shall at any time be commenced against the said corporation, the service of the original or other process, on the President or Recorder alone, shall be sufficient. The President, Recorder and Trustees are hereby authorized to have one common Seal for the use of the said corporation, and the same to alter at their discretion."

"Sec. 3. The persons elected President, Recorder and Trustees shall, annually before they enter upon the duties of their respective offices, take an oath, or make solemn affirmation, well and truly to perform the duties of their several offices, according to the best of their skill and abilities. The President, and Recorder and Trustees so appointed and qualified, shall have power to appoint an Assessor, a Collector or Town Marshall, a Clerk of the Market, Supervisors of the streets and highways, and such other officers as they may deem necessary, and allow such compensation to such officers as they may judge reasonable. They shall also have power to pass such by-laws and ordinances for the regulation, preservation, and improvement of the streets, and public landings, for the removal of nuisances, and for such other purposes as they may deem necessary, for the internal safety and convenience of said town, and the inhabitants thereof, and to impose reasonable fines and penalties on such persons, as shall offend against the laws and ordinances made as aforesaid, provided such by-laws and ordinances are not contrary to the laws and constitution of this State, or of the United States."

It may be seen that the General Assembly in 1820 conferred upon the Town no power of taxation.

The General Assembly on January 17, 1826, passed an Act concerning said Town, by section 3 of which said Act the Trustees of said Town were empowered as follows:

"For the better enabling the Trustees to improve the streets and alleys, and to remove such nuisances as effect the health of the inhabitants of said town, they shall have power to levy such reasonable taxes on all tithables, and on all real and personal property within the said town, as they may deem necessary: Provided that they shall not in any one year levy more than one dollar on each tithable, or more than fifty cents on every hundred dollars worth of property in said town."

The General Assembly on March 26, 1842, further amended the Act incorporating the Town of Parkersburg.

This amendment authorized distraint for taxes, the establishment of wharves and landings, and the preservation of peace. Section 6 of said Act was in the following words:

"Be it further enacted, That it shall be lawful for the President, Recorder and Trustees of the town of Parkersburg to establish and construct wharves, landings and docks ony any street or alley, or on any ground which does now belong or which may hereafter belong to the said town, or which may be condemned in due course of law for such purpose, and to repair, alter or remove any wharf, dock or landing at the mouth of any street, or any other ground in the said town, to which the said town, or the Trustees thereof, may have been or may hereafter be authorized by individual conveyance, or any other manner, to use for landing, wharfing or dock purposes, and to establish and collect rates and taxes for using in any manner the said landings wharves, or docks; and they shall further have authority to pass and enforce such by-laws, rules and regulations as shall be proper to keep not only those hereby authorized, but all other public landings, wharfs and docks of said town, in proper order and repair, and to preserve peace and good order at the same, and to regulate the manner in which the same shall be used by any ferry and other boats or vessels whatsoever."

The Act of March 17, 1851, simply authorized the extension of the corporate limits of the Town, and gave permission to the Town to subscribe for, not exceeding two fifths of the capital of any joint stock company, incorporated for the purposes of constructing any work of internal improvement, to pass through, by or terminating at or near the said town, and to borrow money for the purpose of paying such subscription, etc.

The General Assembly of Virginia enacted no other legislation relating to the taxing power of the Town of Parkersburg prior to June 8, 1855. *An examination of these acts discloses the fact to be that the Town of Park-*

ersburg had express authority to levy taxes; but it had no legislative authority either express or implied to grant immunity from taxation.

Taxation being an essential function of government the authority to relinquish it must be clearly conferred and every doubt will be resolved against the existence of the power of exemption and against the averment that such a power has been exercised.

Opinion of Circuit Court of Appeals, (Printed record, page 164),
Wilmington and Weldon Railroad v. Alsbrook, 146 U. S. 279, 294.
St. Louis v. United Railways Co., 210 U. S. 266, 273,
J. W. Perry Co. v. Norfolk, 220 U. S. 472, 480.
Whiting v. West Point, 88 Va. 905, 14 S. E. 698, 15 L. R. A. 860, 29 A. S. R. 750,
Richmond v. Virginia Railway and Power Co., 124 Va. 529, 98 S. E. 691,
3 Dillon Municipal Corporations (5th Ed.) sec. 1310.

A municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation, not simply convenient, but indispensable.

Christie v. Malden, 23 W. Va. 667, (syl. 4),
Charleston v. Reed, 27 W. Va. 681, (syl. 1),
Gas Co. v. Parkersburg, 30 W. Va. 439, 4 S. E. 650,
Richards v. Clarksburg, 30 W. Va. 496, 4 S. E. 774,
Clarksburg etc. Co. v. Clarksburg, 47 W. Va. 744, 35 S. E. 994,

Marley v. Godfrey, Mayor, 54 W. Va. 54, 46 S. E. 185,
Harvey v. Elkins, 65 W. Va. 309, 64 S. E. 247,
1 Dillon Munc. Corp., Sec. 89,
1 Beach Pub. Corp., sec. 538.

Municipal corporations are created by the legislature, and they derive all their power from the source of their creation.

Roberts v. Burlington, 3 Wall, 654, 18 L. Ed. 79.

Municipal corporations have only such powers of government as are expressly granted them, or such as are necessary to carry into effect those that are granted. No powers can be implied except such as are essential to the objects and purposes of the corporation as created and established. *They can bind the people and property only to the extent of their powers.*

Ottawa v. Carey, 108 U. S. 110, 27 L. Ed. 669,
Barnett v. Dennison, 145 U. S. 135, 36 L. Ed. 652.

Where one relies upon an exemption from taxation, both the power to exempt and the contract of exemption must be clear. Any doubt or ambiguity must be resolved in favor of the public.

J. W. Perry Co. v. Norfolk, 220 U. S. 480, 55 L. Ed. 551,
St. Louis v. Ry. Co., 210 U. S. 273, 52 L. Ed. 1057,
1 Beach Pub. Corp., sec. 539,
Ottawa v. Carey, 108 U. S. 110,
Keokuk etc. Ry. Co. v. Mo., 152 U. S. 301, 38 L. Ed. 450,
McQuillan on Munic. Corp., Vol. V., sec. 2400,
Rochester R. Co. v. Rochester, 220 U. S. 248, 51 L. Ed. 789,
North Mo. R. Co. v. Maguire, 87 U. S. 46, 22 L. Ed. 287,
West Wisconsin R. Co. v. Supers, 93 U. S. 595, 23 L. Ed. 814,
Minot v. R. Co., 85 U. S. 206, 21 L. Ed. 888.

Such a privilege of immunity cannot be made out by inference or implication but must be conferred in terms too clear and plain to be mistaken, or in fact admitting of no reasonable doubt.

37 Cyc. 892.

An alleged statutory grant of exemption from taxation will be strictly construed.

37 Cyc. 892.

When an exemption from taxation is claimed under a contract, the party claiming it must point out specifically an express exemption in the contract.

Home Telephone etc. Co. v. Los Angeles, 211 U. S. 265, 53 L. Ed. 175,
St. Louis v. R. R. Co., 210 U. S. 266, 52 L. Ed. 1054,
N. Y. etc. v. Tax Commissioners, 199 U. S. 1, 50 L. Ed. 65.

The Courts are reluctant to recognize a contract of exemption from taxation, even when expressed. They will certainly not make one for the parties.

Tucker v. Ferguson, 89 U. S. 527, 22 L. Ed. 805,
Christ Church v. Philadelphia, 65 U. S. 300, 16 L. Ed. 602,
Welch v. Cook, 97 U. S. 541, 24 L. Ed. 1112,
N. W. Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. Ed. 1036,
Vicksburg R. R. Co. v. Dennis, 116 U. S. 665, 29 L. Ed. 770,

He who would shelter himself under an exemption clause in a tax law must present a clear case free from all reasonable doubt.

Comas Stage Co. v. Sam Kozer, Sec. of State, 104 Or. 600, 209 Pac. 95, 25 A. L. R. 27, (syl. 10).

Taxation of all property being the rule and exemptions the exception, exemptions will never be presumed or implied in reference to property which would be subject to taxation without some express grant of immunity. And even in cases where it is claimed that there has been an express grant of exemption, it is an invariable rule that every presumption must be in favor of a continuance of the taxing power and against any surrender thereof.

12 A. and E. Encyc. Law (2nd Ed.) 285.

Municipal corporations have no power of taxation, unless the power be plainly and unmistakably conferred; and laws conferring on them powers of taxation must be strictly construed.

Richmond v. Daniel, 14 Gratt. 385,
Orange etc. R. Co. v. Alexandria, 17 Gratt. 176,
Peters v. Lynchburg, 76 Va. 927,
Kirkham v. Russell, 76 Va. 956,
Schoolfield v. Lynchburg, 78 Va. 366,
Lynchburg v. Norfolk etc. R. Co. 80 Va. 237,
Green v. Ward, 82 Va. 324,
McCrowell v. Bristol, 89 Va. 652, 16 S. E. 867,
Whiting v. West Point, 89 Va. 741, 17 S. E. 1,
Probasco v. Moundsville, 11 W. Va. 501,
Fairmont v. Bishop, 68 W. Va. 312, 69 S. E. 301.

A municipal corporation has no inherent power to tax, or to exempt from taxation, and such corporation can levy no tax unless the power be plainly and unmistakably conferred, and a contract to exempt without legislative authority, is void.

Probasco v. Moundsville, 11 W. Va. 501,
Whiting v. West Point, 88 Va. 905, 14 S. E. 698,

State v. Hannibal etc. R. Co., 75 Mo. 208,
Tampa v. Kaunitz, 39 Fla. 683, 23 So. 416, 63 A. S. R. 202,
Richmond v. Va. P. & Ry. Co., 98 S. E. (Va.) 691,
Augusta Factory v. Augusta, 83 Ga. 734, 10 S. E. 359,
37 Cyc. 885.

Pertaining as it does to the sovereign power of taxation, municipalities of a state have not the exempting power except as they are expressly authorized by the State.

1 Cooley on Taxation (3rd Ed.) 344, (citing many cases.)

Municipal corporations have only such portion of the legislative taxing power as is expressly delegated to them. They have no inherent power of exemption and the grant of power to tax does not include power of exemption or commutation.

Gray's Limitations of Taxing Power, sec. 1331, (citing many cases.)
1 Nellis on St. Rys. (2nd Ed.) sec. 167.

A municipal corporation having general authority to levy a tax on property within its jurisdiction has no implied or inherent authority to exempt any property or any particular class of property from taxation, and any contract or ordinance of a municipal corporation purporting to grant such exemption, if made without express legislative authority, is void.

26 R. C. L. page 298 (citing many cases.)

A municipal corporation has no power to grant immunity from taxation in the absence of legislative authority, and an attempt to do so will be ineffectual.

7 A. and E. Ann. Cas. 1013—note (citing many cases.)
20 A. and E. Ann. Cas. 286 —note (citing many cases.)

A municipal corporation possesses no inherent power to create exemptions from taxation, nor can such a power be implied from a delegation of the power to tax; but it exists only when the legislature has expressly granted it, and can be exercised only within the limits of such grant.

12 A. and E. Encyc. Law (2nd Ed.) 283.

"The imposition of and exemption from taxation must be by one and the same state authority, that of legislation; hence towns and cities, etc., cannot exempt property from taxation, or discriminate in favor of any property, as the power to exempt property from taxation is not included in the power to tax. It must be specially conferred.

Desty on Taxation, Vol. I, page 466.

The Virginia Case of Whiting vs. West Point, 14 S. E. 788, so well states principles applicable to the very proposition now under discussion that we take the liberty to quote extensively from Judge Lewis' excellent opinion therein:—

The real question in this case is whether a municipal corporation has the inherent power to exempt from taxation any property which by its charter it is authorized to tax. The town of West Point, by the fourteenth section of its charter, is authorized to tax "all the real and personal property" in the town; and by the following section it is made the duty of the town council annually to appoint an assessor, whose duty it is to assess "all personal property and all improvements put upon real estate" in the town since the last preceding assessment. Nothing is said in

the charter about making exemptions. Has the corporation, then, the power to make them? We think it clear, both upon principle and authority, that it has not. A municipal corporation has no element of sovereignty. It is a mere local agency of the State, having no other powers than such as are clearly *and unmistakably granted by the law-making power. A doubtful corporate power, it has been said, does not exist; and when any power is granted, and the mode of its exercise is prescribed, that mode must be strictly pursued.* Minturn v. Larue, 23 How. 435; Roper v. McWhorter, 77 Va. 214; Green v. Ward, 82 Va. 324; City of Richmond v. Daniel, 14 Grat. 385; 1 Dill. Mun. Corp. (4th Ed.) sec. 91. *Now, the power of taxation is not only an attribute of sovereignty but it is essential to the existence of government; and as all are protected by the government, so all should contribute to its support.* "However absolute the right of any individual may be," says Chief Justice Marshall, "it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature." Bank v. Billings, 4 Pet. 514. Nor, strictly speaking, is this power of the legislature transferable, for, as we shall presently see, whenever taxes are imposed, whether by a municipality or the state, it is, in legal contemplation, the act of the state, acting either by her own officers or other agents designated for the purpose. So, also, is the power to make exemptions sovereign in its nature, and likewise resides in the legislature, unless the constitution otherwise ordains. *It is therefore a legal solecism to say that the power of exemption, or any other sovereign power, is inherent in a municipal corporation, which, though invested with certain governmental powers for local purposes, is in no particular sovereign.* An eminent writer, in treating specifically of the right to make exemptions, observes that the general rule on the subject is well settled and familiar. "Pertaining, as it does, to the sovereign power to tax," he says, "the inferior municipalities of a state are not possessed of it, and cannot, therefore, make exemptions except as expressly authorized by the state;" and that, "when properly made, they must be determined in the legislative discretion; but even this," he adds, "is not untrammeled." Cooley, Tax'n, 200. Judge Dillon, Desty, and other writers

on the subject state the doctrines in the same way, and the adjudged cases to the same effect are numerous.

A leading case, and one which closely resembles the present, is State v. Railroad Co., 75 Mo. 209. In that case the city of Hannibal contracted with the railroad company to exempt its property from city taxation for and in consideration of the annual payment by the company of $700.00. The contract recited that the company denied the right of the city to tax its property, and intended, if such right were exercised, to remove its general office and machine-shops from the city to some other point; and it was this that led to the making of the contract. Several years after the date of the contract, the company having in the mean time fully compiled with it, the property of the company was assessed for the city taxes, and thus *the question arose whether the contract was valid, and it was held that it was not. The court rested its decision upon the ground that the power to make exemptions was not conferred by the city's charter, and that the delegated power to tax was in the nature of a public trust, which could not be surrendered in whole or in part.* No argument, it was said, was necessary to show that the same principle which forbids the absolute cession by a municipality of this power, likewise forbids that which approximates thereto, namely, the right to make exemptions. It was said, moreover, that the idea of taxation imports equality or apportionment; that it is this which distinguishes taxation from arbitrary exaction; and that the exemption of the property of one person casts an inequitable burden on others not thus graciously favored. The same principle was enforced in City of Austin v. Coal Co., 69 Tex. 180, 7 S. W. Rep. 200. In that case the city of Austin contracted with the defendant company to exempt its property from taxation in consideration of its furnishing gas to the city at a reduced rate. The contract, however, was held ultra vires. "The legislature," said the court, "never having attempted to confer upon the city the power to exempt any property which it was authorized to tax, the contract relied upon, in so far as it attempted to give the exemption claimed, must be held void." In Wilson v. Supervisors, 47 Cal. 91, an order remitting taxes, though made pursuant to a legislative act, was held void, on the ground

that it was repugnant to the constitution of California, which provides that "taxation shall be equal and uniform," and that "all property shall be taxed in proportion to its value."

These authorities, which are only a few of many that might be cited to the same effect, show that *the rule requiring all municipal powers to be construed strictly, applies especially to a case like the present. And the reason, as already suggested, is this: that the power of taxation, being an attribute of sovereignty, can be exercised only by the sovereign.* Hence, when delegated by the legislature to a municipal corporation, the latter is considered as, pro hac vice, the agent of the state, acting for the benefit of the municipality. *In other words, the municipality, in the eye of the law, is the hand of the state by which the tax is laid and collected. Therefore the statutory authority must be stricitly pursued, for as an agency to sell does not imply an agency to buy, so neither does a delegated power to tax imply a power to exempt. If this were not so, and if a municipal corporation could at pleasure, exempt the property of one person, it could exempt the property of all, and thus deprive itself of the means of existence, or of accomplishing the objects for which it was created. This principle, which is the touchstone of the case, is not a new one. It has been recognized, not only by this court, but by the Supreme Court of the United States, and other courts, of last resort in this country. Indeed it lies at the very foundation of the law of municipal corporations.*

As said by Mr. Justice Miller in Savings and Loan Association v. Topeka, 20 Wall. 655, 22 L. Ed. 461, "The power to tax is the strongest, the most pervading of all the powers of government, reaching directly or indirectly to all classes of the people.

"This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised. To lay, with one hand, the power of the government on the property of the citizen, and with the other to bestow it upon favored individuals,

to aid private enterprises and build up private fortunes, is none the less a robbery because it is done under the forms of law and is called taxation. This is not legislation. It is a decree under legislative forms."

The Virginia Case of City of Richmond v. Virginia Railway and Power Company, 98 S. E. 691, is in point in many respects with the case at bar. That was a chancery proceeding having for its object the enforcement of the lien of certain city taxes for the years 1909 to 1913, both inclusive, on certain land belonging to said Power Company located in what was the City of Manchester prior to its annexation to Richmond in 1910. Said land consists of about twenty-nine (29) acres, including the Manchester Canal. Said Power Company in 1909 acquired said land from certain special commissioners of court in execution of a decree of sale thereof. Back of said special commissioners sale the title traces to a sale in 1881 by the City of Manchester to the Richmond and Alleghany Railroad Company, a predecessor in title to said Power Company.

It was covenanted in a written contract evidencing the last named sale, and in the last named conveyance, as follows:

"That a part of the consideration for the purchase by the party of the second part of said property is that the City of Manchester is to and does hereby exempt said property forever from taxation by its authorities, either direct or indirect, general or special, and also all improvements or other property now thereon or which may hereafter be added thereto."

The money consideration paid was $200,000 (a part of which was paid by said Power Company), of which only about $100,000 was paid for the real estate and the remaining $100,000 was paid as the consideration for three

other things, viz:—(1) For said city tax exemption; (2) for the dismissal of a certain damage suit; and (3) for the right of laying tracks in certain communities, and for other privileges.

There is evidence in the cause, tending to show that such tax exemption "was a most vital part of the consideration, was thoroughly discussed by the attorneys for the Railroad company and the city attorneys for the city of Manchester, * * * was considered by them to be proper and legal and necessary," and that perhaps the purchase would not have been made but for the tax exemption covenant aforesaid.

At the time of said 1881 sale, the reservoir of the city of Manchester was supplied with water from the said Manchester Canal by pumps furnished and operated by the city. The contract of sale of 1881 aforesaid contained an agreement that the city of Manchester might "continue to have the use of the water from said canal to the same extent it now has," but it was therein provided that in no event should this water be drawn off in excess of "a total of eighty feet (cubic) per second during twenty-four hours, this amount to include the supply to the reservoirs and the power necessary to pump the same; "and there was the additional provision that the city should have "the right of ingress, egress and regress to and from said pumps so long as they are so used as aforesaid." Such use of such water ceased when Manchester was annexed to Richmond.

It is in evidence that the city of Manchester was, in the year 1875 seriously financially embarrassed and so continued, or grew worse, until the sale aforesaid was made in 1881, having difficulty in paying the outstanding interest on its bonded indebtedness; but that such sale wholly

relieved it from such embarrassment, and that the sale was made for that purpose on the part of the city of Manchester.

The Legislative authority under which the city of Manchester inserted said city tax exemption covenant in said 1881 contract of sale and deed is contained in Acts of Assembly 1874-75, page 264, and, so far as material, is as follows:

"* * * It shall be lawful for the common council of the city of Manchester * * * to make sale of the Commons, including the water power * * * * of said city, by such mode and upon such terms as said common council shall deem proper."

Said Power Company claims that it holds said land exempt from taxation. The court considered two main questions in this case, the first of which was: "Is the municipal tax exemption above set forth valid?"

The Court decided that the exemption was not valid, Judge Sims saying in the opinion of the court:—

"Statutory provisions relied on to have the effect of relinquishing the taxing power or of authorizing a municipality to do so will be strictly construed against the claim of relinquishment, even when the legislative right to so act in the premises unquestionably exists. The intention of the Legislature to make or to authorize the making of such a relinquishment will certainly not be inferred or presumed from the language of a statute which is plainly capable of another construction."

As said by Chief Justice Marshall, in the case of Bank v. Billings, 4 Pet. 514, at page 561 (7 L. Ed. 939), in speaking of the taxing power:

"It would seem that the relinquishment of such a power is never to be assumed."

As said on the same subject by Mr. Justice Field, in Minot v. Phil., etc., R. Co., 18 Wall. 206, 21 L. Ed. at page 894:

"* * * Before any exemption * * * can be admitted, the intent of the Legislature to confer the immunity * * * must be clear beyond a reasonable doubt."

As said in 4 Dillon on Mun. Corp. (5th Ed.) 1401:

"As the burden of taxation ought to fall equally upon all, statutes exempting persons or property are construed with strictness, and the exemption should be denied to exist unless it is so clearly granted as to be free from fair doubt. Such statutes will be construed most strongly against those claiming the exemption"—citing numerous authorities.

The same principle applies in the construction of a statute relied on to confer the power of tax exemption upon a municipality. Accordingly, it is well settled that a charter provision (which is, of course, a statute), or other statute, will not be construed to confer upon a municipality the authority to make a tax exemption, unless such authority is expressly given. Whiting v. Town of West Point, supra (88 Va. 905, at pages 906, 910, 14 S. E. 698, 699 (15 L. R. A. 850, 29 Am. St. Rep. 750), and authorities cited: 1 Cooley on Taxation (3rd Ed.) page 344.

As said by the last cited authority:

"Pertaining as it does, to the sovereign power to tax, the municipalities of a state have not the exempting power, except as they are expressly authorized by the state"—citing numerous authorities.

The language in the statute of 1875 (quoted in the statement preceding this opinion) on which the railway and power company must rely to confer the power in question merely confers the power of sale of the property upon the common council of the city "upon such terms as said common council shall deem proper." The word "terms" may have a broad meaning, it is true, and might be given the meaning contended for by the appellee in the case before us. But, to say the least, such language is equally susceptible of the construction that the terms referred to are merely the terms of payment of the purchase money, including the manner of securing any deferred payments, etc., as it is of the construction that a tax exemption was

thereby intended to be authorized. Similar language is frequently used in deeds, wills, and other writings creating powers of sale, and the former is the usual and ordinary meaning of the word "terms" when used in connection with provisions conferring a power of sale. Words and Phrases (1st Ed.) page 6922; Id. (2nd Ed.) pages 884, 885. And such, as we think, is the meaning with which the language we are dealing with was used in the statute under consideration.

The second main question with which the court dealt in the Richmond case was the subject of "commutation" of which we shall see more anon.

Counsel for appellant attempt to show that the exemption was valid. (See their brief, page 30).

And as authority for the exemption they cite us to Jones v. Richmond, 18 Gratt. 517, decided in 1868, a far different case from that at bar. That was a case where on April 2, 1865, in anticipation of the evacuation of Richmond by the Confederate Army, the city council ordered the destruction of all liquor in the city, and undertook to pay for it. The Court said in its opinion:

"But the question is raised whether these resolutions were within the scope of their corporate powers. This court has judicially recognized this corporation as a public municipality, as well as a private one, and clothed with delegated trusts of a governmental kind. The General Assembly has chosen to impart to it some of its own sovereign attributes over the people and property embraced by its charter. It is needless to enumerate these. It is sufficient for the purpose of this enquiry to state, that it possesses all the general corporate "powers and capacities appertaining to municipal corporations in this commonwealth," and that by the 29th section of its charter, the Council is specially empowered to "pass all by-laws, rules and regulations, which they shall deem necessary for the peace, comfort, convenience, good order, good morals,

health or safety of said city, or of the people or property therein."

The Council, under the charter of the city, had authority to make the order and the pledge; and the city is responsible for the value of the liquor destroyed under the order.

In the pursuit of their Free cities theory (see their Brief, page 3) counsel for appellant have completely overlooked the Virginia case of City of Richmond v. Daniel, 14 Gratt. 385, decided in 1858 in which the Supreme Court of Virginia says:—

"The only question is, Whether the city council, acting under the charter of the city of Richmond, had authority to assess the taxes on railroad stock held by the defendant? The chartered powers of the city, so far as involved in this case, are created and defined by the statutes, ch. 335, page 259, Sess. Acts 1852; and chapters 54 and 56 of the Code of Virginia.

"In order to ascertain the extent of the powers granted, it is necessary to know the general principles ruling the construction of such grants. The power in question is of the class merely derivative, and to be distinguished from the class of original and sovereign powers. Each class has its own rules of construction. The first named having power only in derogation of common right, being merely carved out of the power theretofore vested only in the general assembly, its powers are to be strictly construed. See 2 Kent's Com. p. 298; Grant on Corporations 7 and 8; Richmond, etc. R. R. Co. v. Louisa R. R. Co., 13 How. U. S. R. 71. *Especially is the power of taxation, when granted to a subordinate body, to be strictly construed.* The powers of the second class are illustrated in the general assembly. That body is invested with the sovereign power of taxation pertaining to the whole commonwealth, with only the limits prescribed by the mandates or the prohibitions of the constitution. *The council of the city of Rich-*

mond can exercise no power of taxation unless granted by charter; the general assembly may exercise all power of taxation not prohibited by the constitution; and it may omit to exercise the power, unless compelled to act by mandate of the same instrument.

"That the general rule of strict construction is to be applied to charters, seems free from doubt; and I find nothing to warrant a different rule in regard to the charter of the city of Richmond."

Counsel for appellant in their Brief (Page 32, thereof) quote, in part, City of Richmond vs. R. & D. R. R. Co., 21 Gratt. 604, a case of exemption by the STATE LEGISLATURE. They make no mention of the principles of corporation law therein discussed. Syllabi 5 and 6 are as follows:—

"5. THE POWER OF EXEMPTION, AS WELL AS THE POWER OF TAXATION, IS AN ESSENTIAL ELEMEN OF SOVEREIGNY; AND CAN ONLY BE SURRENDERED OR DIMINISHED, IN PLAIN AND EXPLICIT TERMS.

"6. MUNICIPAL CORPORATIONS ARE MERE AUXILIARIES OF THE GOVERNMENT, ESTABLISHED FOR THE MORE EFFECTIVE ADMINISTRATION OF JUSTICE; AND THE POWER OF TAXATION CONFIDED IN THEM IS A DELEGATED TRUST."

Counsel for appellant (their Brief, page 31) cite Danville v. Shelton, 76 Va. 325, and Williamson v. Massey, 33 Gratt. 242, as authority for their Free city theory. These cases were very strongly commented upon by the Supreme Court of Virginia in Whiting v. West Point, 88 Va. 905, 14 S. E. 700, in the following language:—

"Municipal corporations are mere auxiliaries of the state government, established for the more effective administration

of the government, and that when they exercise the delegated power of taxation they act as agencies of the state, and not by virtue of any inherent authority, laid it down as a corollary from these propositions that the power to say what species of property shall be the subject of taxation or exemption belongs to the legislature.

"The application of these principles is decisive of this case. They are certainly reasonable, and are conceded to be well settled in the jurisprudence of the country outside of Virginia. But are they not also law in Virginia? The defendants deny that they are, and rely upon two recent cases in this court. These cases are Williamson v. Massey, 33 Gratt. 237, and Town of Danville v. Shelton, 76 Va. 325. The first of these cases, so far from settling anything in regard to the powers of a municipal corporation, in no way relates to the subject. The single question there was whether it was competent for the legislature to exempt from taxation the bonds of the state, issued under the act of March 28, 1876. Judge Anderson filed a written opinion, which was not the opinion of the court, nor does it purport to be, in which he took the ground that the power of the legislature to make exemptions was unrestricted. And he also took occasion to say—though obviously foreign to the case—that municipal corporations have the same power. His idea was that the exercise of this power by the local authorities is often essential to the introduction and growth of manufactures and other industrial enterprises which tend to build up the cities and towns, and to advance the prosperity of the state. But in this opinion Judge Christian alone concurred. Moncure, P., was absent; Judge Staples dissented; and Judge Burks, who concurred in awarding the mandamus, did so on the distinct ground, as he stated, that the power to exempt bonds in question was incidental to the power to contract, and to provide the means for paying, such obligations. He did not consider it necessary, he said, to decide the question as to the general power of the legislature to make exemptions, and declined to express any opinion upon it. *The point was therefore left undecided, as it afterwards was in City of Petersburg v. Association*, 78 *Va.* 431. *But had it been decided, the decision could not affect the power of municipalities, for no such question was be-*

fore the court. It is insisted, however, that the question was settled in Town of Danville v. Shelton, supra. The first comment we have to make upon that case is that, although not so stated by the reporter, the fact is the case was heard by three judges only. Moncure, P., sat in no case reported in that volume; and Judge Staples, as the record shows, (Order-Book No. 26, p. 324) was "absent" also. Judge Burks concurred in the result merely; and in view of what he had previously said in Williamson v. Massey, the inference is irresistible that he did so because of some point or points in the case other than that relating to exemptions. But, be that as it may, Judge Anderson's opinion was concurred in by Judge Christian only; and it need hardly be said that a case so disposed of is no authority for any other case. It is not "a precedent" under the rule of stare decisis. City of Dubuque v. Railroad Co., 39 Iowa, 56, 19. But, aside from this, is the opinion upon the point involved in the present case sound? The question there was as to the validity of an ordinance, passed the same day it was introduced in the council, imposing taxes and exempting the property of a certain building association. The charter of the town provided that no ordinance imposing taxes should be valid unless introduced 10 days before its passage. Accordingly the ordinance was assailed (1) because it was repugnant to this provision of the charter; (2) because the exemption was illegal; and (3) because of the inequality of the tax imposed upon the plaintiffs. Judge Anderson, after fully discussing the first objection, held it to be well taken, as it undoubtedly was, and that was decisive of the case. The second point he disposed of in few words, saying: "I am of opinion that the council had the power of exemption. This question was thoroughly considered in Williamson v. Massey, and I beg to refer to what I said upon it in that case." He also referred to City of Richmond v. Railroad Co., 21 Grat. 604, and to Railroad Co. v. Alexandria, 17 Grat. 176. The first-mentioned case has already been commented on. One of the questions in the second was as to the power of the legislature (under the constitution of 1830) to exempt the property of the railroad company from city taxation, as was done in its charter, granted in 1847; and it was held that it had. And the case in 17 Grat. turned simply upon the construction of

a statute, the question being whether the legislature intended to exempt the property of the O. & A. R. R. Co. from taxation by the city of Alexandria. No question as to the power of a municipal corporation to make exemptions arose in either case. *It is obvious, therefore, that the authorities cited do not support the proposition for which they were cited; so that the opinion of Judge Anderson is without the support of Virginia authority, and is contrary,* as is conceded, to the settled law in other states, and it may be added, to public policy and principle as well."

* * * * * * * * * * * *

"To hold that a municipal corporation in Virginia inherently possesses the important and responsible power contended for by the defendants, would be a decision fraught with mischief. The circumstances of this very case are at least suggestive of the liability to abuse of such a power in such hands. *It appears that of the seven members of the council, when the ordinance restoring the exemption in question was passed, four were employes of the terminal company.* The latter all voted for the ordinance, while those not so employed voted against it. The result was to relieve the company of the burden of a tax on property assessed at $710,480.15, thereby, to that extent, increasing the burdens to be borne by the others. And although we do not intend by these remarks to reflect upon the council, or any one else, yet the facts just mentioned ought to serve as a warning against establishing a doctrine in this state that has been wisely rejected by our sister states."

And in Danville v. Shelton, 73 Va. 324, upon which appellant relies, the Court says:—

"But municipal corporations have only such powers as the legislature of the State confers."

Let us now apply the principles heretofore stated, to the case at bar. Appellant certainly doesn't pretend that any Act of the General Assembly "in express words" ever

granted to the Town of Parkersburg the power to confer upon the North Western Virginia Railroad Company the exemption for which appellant is contending. Nor do we think that such power can be "necessarily or fairly implied" or held incident to the powers expressly granted. The exercise of such power may be convenient, but that is not sufficient; it must be essential and indispensable to the powers expressly granted, or to the declared objects and purposes of the corporation. It is certainly not essential or necessarily incident to any power expressly granted that the Town should grant to a private individual or corportaion A PERPETUAL EXEMPTION from taxation such as the appellant is claiming. It would plainly be a manifest violation of the cardinal principles above stated to imply that the General Assembly intended to confer upon the city the power to contract away to a private corporation its right to levy and to collect taxes upon the property of said private corporation, and thereby deprive itself of all power or control over the matter for all time.

We submit, without further argument, that the Town of Parkersburg in 1855 was entirely without power to grant to the Northwestern Virginia Railroad Company the alleged exemption.

B. The situation would not be different, if the alleged immunity from taxation were treated as a so-called commutation of taxes.

The bill of complaint (Printed record, page 6) claims "that by virtue of said deed of June 8, 1855, and of the said contract of the same date, and according to the terms, covenants and stipulations therein contained, the property of the North Western Virginia Railroad Company in the Town of Parkersburg, was made free of all taxes and assessments or other charges, and that this exemption was

in effect a commutation of all taxes and assessments and other charges which the said Town or the said City might thereafter levy or make upon the property conveyed to the said Town of Parkersburg, and to which the City of Parkersburg has succeeded as set forth in the said deed of June 8, 1855."

In other words it is contended that in 1855 when the city was only a town and the region about it was a "howling wilderness," the municipality for a consideration bargained away for all time its power to tax whatever property the Northwestern Virginia Railroad and its successors forever might then own or thereafter acquire.

It is true that it has been held in numerous cases that a city may make a valid contract to pay or allow the whole or a part of the taxes as compensation for a continuous service rendered, such as furnishing water to the city. This is put on the ground that in such case there is no exemption from taxes but an agreement in substance that the amount of the taxes should be paid from year to year as compensation for the current service rendered.

Opinion of the Circuit Court of Appeals, (Printed record, page 165.)

Conery v. New Orleans Water Works Co., 51 La. A. 910, 7 So. 8;
Board of Councilmen v. Capital Gas & Electric Light Co., 29 S. W. 855;
Town of Canaan v. Enfield Village Fire District, 74 N. H. 517, 70 Atl. 250, 258;
Maine Water Co. v. City of Waterville, 93 Me. 586, 45 Atl. 830;
Phillips v. City of Portsmouth, 115 Va. 180, 78 S. E. 651;
Bartholomew v. City of Austin, 85 Fed. 359;
Grant v. Davenport, 36 Iowa, 405;

Montclair Water Co. v. Town of Montclair, 8 N. J. 573, 79 Atl. 258;
Alpena City Water Co. v. City of Alpena, 130 Mich, 413, 90 N. W. 323.

Municipal corporations have only such portion of the Legislative taxing power as is expressly delegated to them. They have no inherent power of exemption and the grant of power to tax does not include power of exemption or commutation.

Gray's Limitations of the Taxing Power, sec. 1331, citing:

Birmingham v. Waterworks Co. 139 Ala. 531, 36 So. 614;
Wilson v. Supervisors, 47 Cal. 91;
Tampa v. Kaunitz, 39 Fla. 683, 23 So. 416;
New Orleans v. St. Charles St. R. Co., 28 La. Ann. 497;
State v. Hannibal etc. R. R. Co. 75 Mo. 209;
Hazlitt v. Mt. Vernon, 33 Iowa, 229;
Mack v. Jones, 21 N. H. 393;
Austin v. Austin Gas etc. Co., 69 Tex. 180, 7 S. W. 200;
Whiting v. Town of West Point, 88 Va. 905, 14 S. E. 698;
Cartersville Waterworks Co. v. Cartersville, 89 Ga. 669, 16 S. E. 70;
Cartersville Improvement Etc. Co. v. Cartersville, 89 Ga. 683, 16 S. E. 25.

In the Hannibal R. R. Co. case a City contracted with a Railroad Company to exempt its property from City taxation in consideration of a stated annual payment. It was held that this contract was invalid upon the ground that the City's charter contained no grant of power to make exemption and that the delegated power of taxation was in the nature of a public trust which could not be surrendered in whole or in part.

In the Austin Gas Co. case a City had contracted to exempt a gas company from taxation in consideration of its furnishing gas to the City at a reduced rate and the contract was held to be ultra vires and void.

In the Birmingham Waterworks Co. case the City contracted with a Water Company that the Company should furnish certain water on certain terms. The contract provided that the City should not, for thirty years, impose a greater license tax than $500.00 on the company. Within thirty years the City levied a tax of $1000.00 on the company which resisted payment basing its resistance on the contract. The contract was held void it appearing that there was no express Legislative authority for making it.

In McTwiggan v. Hunter, 18 R. I. 776, 29 L. R. A. 526, it was held:—

Where a city council enters into a contract to exempt certain property from taxation in consideration of the transfer to the city of certain other property, the fact that the city has accepted the benefits of the contract will not estop it from avoiding the same on the ground of lack of power to enter into it.

But to return to the Virginia case of City of Richmond v. Virginia Railway and Power Company, 98 S. E. 691, wherein the subject of "commutation" was fully discussed, as follows:—

The cases relied on by the Virginia Railway & Power Company to support an affirmative decision of the question just stated, or which are cited in the brief for such company on the point urged, viz. that tax exemptions are valid which are supported by a valuable consideration are the following: City of New Orleans v. New Orleans Water-

works Co. (1884) 36 La. Ann. 432; Conery v. New Orleans Waterworks Co., 41 La. Ann. 910, 7 So. 8; s. c. 142 U. S. 79, 12 Sup. Ct. 142, 35 L. Ed. 943; City of Frankfort v. Capital, etc., Co. Ky. (1895) 29 S. W. 855; Bartholomew v. City of Austin, Texas, (1898) 85 Fed. 359, 29 C. C. A. 568; Montclair Water Co. v. Town of Montclair, (1911) 81 N. J. Law, 573, 79 Atl. 258; Grant v. City of Davenport (1873) 36 Iowa 396; Maine Water Co. v. City of Waterville (1900) 93 Me. 586, 45 Atl. 830, 49 L. R. A. 294; Phillips v. City of Portsmouth (1913) 115 Va. 180, 78 S. E. 651.

The whole extent to which the holdings of those cases go, on the question under consideration, is this: That where a continuing service is to be rendered to a municipality for which it has the power to contract, and it does make a contract for such service which is reasonable and valid in other respects, and therein, either expressly or substantially, agrees to pay each year for such service the amount of the city taxes on certain property, and the amount so agreed upon appears to be only a fair return, or but a reasonably adequate consideration for the service rendered, the courts will hold such an agreement not to be, in truth, a tax exemption, but an agreement to make compensation for such service, and that hence such an agreement is enforceable, either by action to recover for the service rendered at the contract price therefor, which is the annual tax, or by set-off of the value of such service against the annual tax as it accrues, so long as such service continues under such contract.

In those cases the failure of consideration, caused by a holding of the tax exemption to be invalid, was a failure of consideration for service actually rendered or to be rendered to the municipality. In the cause before us, it does not appear that the appellee has ever rendered or is obligated to render to the appellant, the city of Richmond, any service whatsoever. The only service which its predecessors in title rendered to the city of Manchester under the 1881 tax exemption covenant aforesaid, was the water supply from the Manchester Canal mentioned in the statement preceding this opinion. That ceased certainly following the annexation aforesaid which occurred in 1910. It does not appear in evidence whether such water supply was furnished in 1909 by appellee. If so, the fact might, upon proper pleading, if the court has jurisdiction of the matter in such a suit as this, furnish a basis

for future decree in the cause in the court below for the relief of the appellee from the city taxes for that year, but no further.

No authority has been cited before us extending the doctrine of the case next above discussed to the point of holding that a municipality may, for any other valuable consideration than services to it such as aforesaid, contract away its taxing power, and that such contract will be held not to be a tax exemption. And, on principle, it will be at once perceived that such a broad power of contract would annul all constitutional provisions against exemption of property from taxation. It is not a question of the presence or absence of a valuable consideration to support tax exemptions against which such constitutional provisions are directed. There has seldom, if ever, arisen a case of tax exemption where such a consideration was not supposed by the taxing authority to exist at the time, and a supposedly sufficient consideration. But the evil of allowing such a power to exist, even in the Legislature, is so manifest that the rules of construction applicable to every alleged tax relinquishment, above adverted to, and the constitutional inhibitions which are now in force in Virginia against the exercise of such a power, have been adopted, and have their foundation deep-seated in principles which are immutable under our form of government.

The foregoing proceeded upon the idea that the tax exemption in fact sought in the case before us was but an exemption for a reasonable time upon property reasonably certain as to its identity and value. Such, however, is not the case before us. The exemption sought is "forever;" it extends, not only to certain property which existed in 1881, but to all which may have been placed thereon since, and also, to all "other property which may hereafter be added thereto, including capital added thereto or used or employed thereon." This would apply to the leaseholds heretofore created or which may hereafter be created touching the real estate and water rights aforesaid, as well as to the remainder of the property, and doubtless to others besides the appellee who may now hold portions of the original property, and, *if the construction of said covenant for tax exemption contended for by appellee were upheld, there would be established within the city upon the* 29 *acres of real estate involved in this cause an imperium in im-*

perio indeed, which we cannot hold to have been within the power of the city of Manchester to create under the authority of the act of Assembly under which it made the covenant aforesaid; aside from any consideration of the power of the Legislature under the Constitution of 1870 *to have granted such authority.*

There is no difference in kind between exemption from and commutation of taxes. They are the same in effect. They both result from a bargain not to exercise the power of taxation. "The thing paid in commutation is but the price of exemption." To say: "I will commute your taxes for a certain sum, payable yearly in a lump, for ever or for a limited time," is nothing more than saying: "I will exempt you from taxation, for a consideration, wholly or partly."

The same authority which denies the power to exempt wholly, denies a partial exemption.

> State v. Hannibal and St. J. R. Co., 75 Mo. 208; Austin v. Gas Co., 7 S. W. Rep. 200.

In the case of the City of Tampa v. Kaunitz, 39 Fla. 683, 23 So. 416, 63 A. S. R. 202, it is said in the opinion:

"Did the city of Tampa have power by contract or otherwise to exempt from taxation the properties of the South Florida Division of the Savannah, Florida, and Western Railway Company, and the Tampa Water Works Company, and to perpetually bind itself to accept from the Tampa Bay Hotel Company, two hundred dollars per annum in full for all city taxes, without regard to the value of its property or the rate of taxation levied thereon? The plaintiff in error cites us to no authorities on this point. He plants himself upon the proposition that the exemptions were granted for a consideration, and that consequently they amounted to a contract with the city. But where does the city derive its authority to make such a contract? We

have not been cited to any statute of this state authorizing the city to exempt this species of property from taxation, nor to make a contract to do so. *Without valid legislative authority, no city or town has power to bind itself by contract, either to forbear to impose taxes on particular property, or to impose them only under given limitations, or on certain given conditions. Black on Tax Titles, sec. 63; Cooley on Taxation,* 200; 1 *Blackwell on Tax Titles, secs.* 110, 117."

In the case of Mayor of Birmingham v. Birmingham Waterworks Company, 139 Ala. 531, 36 So. 614, 101 A. S. R. 49, it appears that the city had power to contract for a supply of water; that the city on June 2, 1888, made a contract with the Waterworks Company, upon the faith of which said company expended a large amount of money in the construction of a waterworks system; that section 22 of said contract reads as follows: "Be it further ordained, that the license tax against said Birmingham Waterworks Company, its successors and assigns, shall not exceed the present license tax during the existence of the contract above named." The license tax at the time the contract was made was $500.00 per annum. By section 14 of the contract the term of the contract was for 30 years. The power of the city to license trades, occupations, etc. is conceded, and no question is made on the reasonableness of the license attempted to be imposed. In the year 1900, the City imposed a license tax of $1000.00 and the Company paid the full amount, $500.00 being under protest. The Company sued to recover $500.00 contending that under the terms of the contract the tax could be only $500.00. The Court held that said section 22 was void, Judge Dowdell saying in the opinion:—

"It seems to be a well established proposition of the law that the levying of a license tax is a legislative or governmental power. In the case of Savings & Loan Assn. v. Topeka, 20 Wall. 655, 22 L. Ed. 461, it is said: 'The power

to tax is, therefore, the strongest, most prevailing, of all the powers of government, reaching directly or indirectly to all classes of people.' In the case of Bills v. Goshen, 117 Ind. 221, 20 N. E. 115, 3 L. R. A. 264, it was decided that an ordinance delegating to the mayor the right to fix the amount of a license fee was void, as a delegation of legislative power. See notes on page 721 of 20 L. R. A., showing that the power to fix a license fee is generally regarded as a legislative power, which cannot be delegated. It is not denied, as a general proposition, that it is in the power of a municipality to contract for a supply of water, since such a right comes within the business or proprietary powers of the corporation, and is not to be classed as a legislative or governmental power. But it does not follow from this that, in the exercise of such a power in the making of a contract for a supply of water, the corporation can by any provision or terms in such a contract delegate or barter away a governmental power, when not authorized so to do by the legislature either in its charter or other statutory enactment. *There can be no difference in principle between delegating a governmental power, and bartering or contracting away such power.* Nor is there any distinction in principle between an agreement not to levy a tax for a term of years, and one which stipulates an annual license tax already levied shall not be increased for a term of years. *It is not pretended that the city of Birmingham, by its charter or other statutory enactment, was expressly authorized to enter into the agreement contained in section 22 of the contract set out above; and, unless the power so exercised is one that can be necessarily and reasonably implied, the agreement not to increase the annual license tax for a term of thirty years was ultra vires the corporation, and consequently void. The settled rule of construction of a grant of power by the state to a corporation calls for a strict construction, and in favor of the state and against the corporation. Such power cannot be implied from the mere fact of its being within the business or proprietary power of the municipality to contract away its taxing power in order to provide for a supply of water, and the implication of such a power must be a necessary one.*"

In the courts below appellant relied upon the case of Stearns v. Minnesota. The great difference between that case and the case at bar is, as we see it, that Minnesota is a soverign state while the Town of Parkersburg was only a municipality with delegated powers, a creature of the Legislature.

The Circuit Court of Appeals had this to say of the Stearns case (Printed record, page 165) :—

"Stearns v. Minnesota, 179 U. S. 223, is relied on as sustaining the validity of the ordinance and contract of exemption. Minnesota received a grant of land from the United States "for the purpose of aiding in the construction of a railroad from St. Paul to the head of Lake Superior." The state granted the land to the Lake Superior & Mississippi Railroad for railroad purposes and no other. In consideration of the grant the railroad agreed to pay, on or before the first day of March of each year, three per cent of the gross earnings "in lieu and in full of all taxation and assessments." The lands were however to be subject to the usual land tax as soon as sold or leased. Other lands involved in the litigation were granted to the Northern Pacific Railroad Company by the United States, the railroad being required by its congressional charter to obtain the consent of any state through which it might pass before commencing work. The State of Minnesota gave its consent to the construction of the road on the condition that the lands and other property of the railroad company should pay the same per cent of its gross earnings to the state as had been exacted of the Lake Superior & Mississippi Railroad, in full and in lieu of all taxes. Afterwards the legislature of Minnesota undertook by statute to subject the property of both railroads to the taxes levied on all other property in the stae, *in addition* to the percentage of gross earnings stipulated in the grants to be in full of all taxes. It is to be observed that the question was not one of complete exemption from taxation, but of the right of a state to grant land and affix as a condition of the grant the measure of taxes which the grantee was to pay each year. The majority of the Court

held that the method of taxation provided by the grant was not an exemption; that it was by virtue of the contracts fixing the tax that land not before subject to taxation as property of the state and of the United States was made taxable; that in bringing it in as taxable property the state could attach any condition precedent it saw fit; and that therefore the state could not impose the current rate of taxation for other property in addition to the three per cent. of gross earnings contracted to be in full of all taxes. None of this reasoning nor the conclusion of the Court can apply to the facts in the case before us. Four judges dissented from the majority view, insisting that the contract was an attempt to exempt property from taxation and impose an unequal tax in violation of the state constitution, and further that the statute of the state exacting the three per cent. of gross earnings in addition to the tax imposed on other property was in violation of the constitutional requirement of uniform taxation."

If it were not enough to defeat the exemption or commutation to say that the Town authorities acted entirely without authority, when they, in their generosity, attempted to give away the Town's right to tax the property of the Northwestern Virginia Railroad Company, forever, we could show still other reasons why this unthinkable contract could not stand. *A contract granting a franchise or binding the city for all future time is unreasonable and void.* (Westminister Water Co. v. Westminister, 98 Md. 551, 56 Atl. 990, 642, 103 A. S. R. 424; State ex rel City of St. Paul v. Minnesota Transfer Co., 80 Minn. 108, 83 N. W., 32, 50 L. R. A. 656; Wellston v. Morgan, 59 Ohio St. 147, 52 N. E. 127.) Judge Cooley in Gale v. Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80 (cited in the Westminister Case, supra) used this emphatic and apposite language:

"It is impossible to predicate reasonableness of any contract by which the governing authority abdicates any of its legislative powers, and precludes itself from meeting in the proper way the emergencies that may arise. Those powers are conferred in order to be exercised again and

again, as may be found needful or politic; and those who hold them in trust today are vested with no discretion to circumscribe their limits or diminish their efficiency, but must transmit them unimpaired to their successors. Ths is one of the fundamental maxims of government, and it is impossible that free government, with restrictions for the protection of individual or municipal rights, could long exist without its existence."

"No authority has been cited, and we think none can be found, holding that a municipal council, without legislative authority, may for a lump consideration in land or money bargain away the power and duty to tax. Statement of the claim of such power is its own refutation. If a municipality could bargain with one tax-payer to accept a gross sum in commutation of all future taxes it could so bargain with all. The exercise of such a power would destroy the continuous flow of financial resources essential to the life of the municipality and implicit in the word taxation."

Opinion of the Circuit Court of Appeals, (Printed record, page 166),

Augusta Factory v. Augusta 83 Ga. 734, 10 S. E. 359.

The whole question of commutation reverts to the right to give away or sell the power to exempt.

It is plain on principle that the Town or City of Parkersburg at no time had power to grant an exemption, or to enter into a contract of commutation of taxes. We again challenge counsel for appellant to point out one statute of the General Assembly that delegated to the Town, expressly or impliedly, that power.

POINT II.

Even if such an exemption had been valid, such immunity from taxation did not pass by foreclosure and sale to the

Parkersburg Branch Railroad Company, or to the Baltimore and Ohio Railroad Company; and, at all events, the exemption became void on the dissolution of the beneficiary, the Northwestern Virginia Railroad Company.

A. Even if the alleged exemption from taxation of the property of the Northwestern Virginia Railroad Company was valid, the Town of Parkersburg never granted to said Railroad Company the power to sell, transfer or assign said exemption, and said Railroad Company was powerless to convey said exemption to any person or corporation whatsoever.

The language of the deed of June 8, 1855, between the President of the Town to the Northwestern Virginia Railroad Company (Printed record, page 20), was as follows in so far as it related to the exemption:—

"And the parties of the first part for the like consideration do further grant and covenant to and with the parties of the second part, that all the property owned, used or occupied by the parties of the second part within the jurisdiction of the parties of the first part, so long as the same is used or appropriated by them to purposes connected with the business of the railroad, shall be free from all Town Taxes, assessments and charges and that all the privileges hereby granted and assured by the parties of the first part to the parties of the second part, shall apply as fully to property and rights hereafter acquired, used or occupied by them within the said Town and jurisdiction, as to those they now own, use or occupy, or may hereafter use and occupy, and subject to the like consideration and limitations."

Are there any words used that would indicate that the Town attempted to give to the Northwestern Virginia Railroad Company the power to assign or transfer this exemption to anyone? There are no words denoting assignability in the deed of June 8, 1855.

Observe the care with which the representatives of the Town avoided the use of any words or phrases from which could be gathered any idea of an intent on their part to vest in the Railroad Company power to transfer or assign the exemption which they were seeking by the instrument to create.

The first syllabus of the case of L. and N. Railroad Company v. Palmes, Collector, 109 U. S. 244, 27 L. Ed. 922, is: "Immunity from taxation granted to a railroad company does not pass by virtue of a conveyance of the railroad and its franchises, but requires for its transfer some particular and express description, indicating unequivocally the intention of the Legislature that it might pass by an assignment."

What a simple matter it would have been for the representatives of the Town, if they had meant that the exemption should be assignable, to have written into the instrument the words "its successors or assigns." But this they did not do.

Surely appellant doesn't contend, after reading over the language of the deed, that the Northwestern Virginia Railroad Company ever had any power to assign any exemption from taxation.

A stream can rise no higher than its source, and since the Northwestern Virginia Railroad Company was not empowered to assign or transfer its alleged exemption, any attempt which it might make to do so, would be of no effect whatsoever. That said Railroad Company could not transfer or assign a thing which it did not have, is such a self-evident proposition that we deem it unnecessary to argue further in support thereof.

B. But admitting for the sake of argument that the Town of Parkersburg had power to grant the exemption from taxation and that the Town did grant the exemption to said Railroad Company, and that the Town empowered the said Company to assign said exemption, said Railroad Company never made any attempt to assign said exemption.

All that was conveyed to the mortgagee by the mortgages of 1853 (Printed record, pages 9 and 12) was:—

"All the property of the Northwestern Virginia Railroad Company of every kind, nature and description, the same may be, as well as that which they may at the time actually hold, as that which in the prosecution, stocking, completion, and working of said railroad company shall be accumulated thereon."

No express or other reference is made or could have been made in 1853 to a thing then not in contemplation, or which did not come into being until 1855.

C. But, granting further for the sake of argument that said Northwestern Virginia Railroad Company in the two mortgages of 1853 used language sufficient to transfer the exemption of 1855; yet by the foreclosure, sale and conveyance of April 3, 1865, the exemption did not pass, and the Parkersburg Branch Railroad Company (or Baltimore and Ohio Railroad Company) obtained no exemption from taxation.

The deed (Printed record, page 43) made by the Mayor and City Council of Baltimore, April 3, 1865, conveyed:

"All the property of the Northwestern Virginia Railroad Company of every kind and description, as well that held by the said company at the date of the deed of trust, aforesaid as that which in the prosecution, completion, stocking and working of said railroad has been accumulated thereon."

It necessarily follows from the fact that the exemption was not conveyed by the mortgages to the mortgagees, that it could not be conveyed to the purchaser at the foreclosure sale. The purchaser could not receive more than was mortgaged. And especially would this be true when the conveyance to the purchaser makes no pretense of transfering the exemption.

Railroad Co. v. Hamblen, 102 U. S. 276-7;
Picard v. R. R. Co., 130 U. S. 637.

D. In respect to this point the Circuit Court of Appeals in its opinion (Printed record, page 166) said:—

"But even if the ordinance and contract of June 8, 1855 had been a valid exemption from taxation of the North Western Virginia Railroad Company, the exemption would not extend to the Baltimore & Ohio Railroad Company, alleged to be the real purchaser at the foreclosure sale made to the Parkersburg Branch Railroad Company in February, 1865. Immunities and exemptions were not mentioned in the mortgage, nor in the deed of conveyance under foreclosure. Conveyance of the property of a railroad with the franchises, rights and privileges does not carry to the purchaser at a foreclosure sale the right of exemption from taxation which had been enjoyed by the mortgagor. Rochester Railway Co. v. Rochester, 205 U. S. 236; Yazoo & Mississippi R. R. Co. v. Vicksburg, 209 U. S. 358; Wright v. Georgia R. R. & Banking Co., 216 U. S. 437; Morris Canal Co. v. Baird, 239 U. S. 126, 131.

"Therefore the Baltimore & Ohio Railroad Company, as purchaser under the name of Parkersburg Branch Railroad Company, took the property in February, 1865, stripped of the tax exemption in favor of the North Western Virginia Railroad Company, if it had ever existed."

Exemption from taxation granted by the Legislature to an individual or a corporation is not a franchise, nor is it an

estate or interest inherent in or running with the particular property exempted; but it is a mere privilege personal to the grantee; and unless there is express statutory authority therefor, the exemption will not pass to a successor of the corporation or to a person taking the property by sale, assignment or other transfer.

37 Cyc. 897 (citing many cases,)
Rochester R. Co. v. Rochester, 205 U. S. 236, 51 L. Ed. 784,
Home Ins. Co. vs. Tenn. 161 U. S. 200, 40 L. Ed. 670,
Phoenix F. & M. Ins. Co. v. Tenn. 161 U. S. 174, 40 L. Ed. 660,
Mercantile Bank v. Tenn. 161 U. S. 161, 40 L. Ed. 656,
Picard v. E. Tenn. R. R. Co., 130 U. S. 637, 32 L. Ed. 1051,
Chicago Etc. R. R. Co. v. Missouri, 122 U. S. 561, 30 L. Ed. 1135,
Chesapeake etc. R. R. Co. v. Miller, 114 U. S. 176, 29 L. Ed. 121,
Memphis etc. R. R. Co. v. Berry, 112 U. S. 609, 28 L. Ed. 837,
Louisville etc. R. R. v. Palmes, 109 U. S. 244, 27 L. Ed. 922,
Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860,
Armstrong v. Athens Co., 16 Pet. 281, 10 L. Ed. 965,
Burlington etc. R. Co. v. Putnam Co. 4 Fed. Cas. No. 2169, 5 Dill. 289,
Yazoo and M. V. Ry. Co. v. Vicksburg, 209 U. S. 833, 32 L. Ed. 358;
Morris Canal Co. v. Baird, 239 U. S. 126, 60 L. Ed. 177.

In construing grants of exemption they will be construed as personal and limited to the grantee unless a contrary intention clearly appears.

37 Cyc. 897,
Nashville etc. R. R. Co. v. Commonwealth, 97 Ky. 162, 30 S. Western 200,
State v. Great Northern R. R. Co. 116 Minn. 303, 119 N. W. 202,
Rochester v. Rochester R. R. Co. 205 U. S. 236, 51 L. Ed. 784,
Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860.

Exemption from taxation does not ordinarily pass on a foreclosure sale.

2 Elliott on R. R. 3rd Ed. page 294,
Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860,
Picard v. E. Tenn. etc. R. R. Co. 130 U. S. 637 32 L. Ed. 1051.

There is conflict in the cases upon the question whether immunity from taxation is a franchise, but the better reason and weight of authority are to the effect that it is not a franchise in the property sense. We think that the rule should be that the immunity cannot be regarded as a franchise passing by assignment, unless that conclusion is imperatively required by the provisions of the statute, *and if there be doubt it must be resolved against the claim that the immunity is a franchise. It is bad enough to permit the immunity to be granted as a contract right, and to extend the erroneous rule beyond what a rigid adherence to the earlier cases require would be to give to a pernicious doctrine a very wide and evil influence.*

2 Elliott on R. R. (2nd Ed.) sec. 901.

Exemptions from taxations are not favored by law and will not be sustained unless such clearly appears to have been the intent of the Legislature. Public policy in all the states has almost necessarily exempted from the scope of the taxing power large amounts of property used for religious, educational and municipal purposes; but this list ought not to be extended except for very substantial reasons, and while, as has been held in many cases, Legislatures may, in the interest of the public, contract for

the exemption of other property, such contract should receive a strict interpretation and every reasonable doubt should be resolved in favor of the taxing power. Indeed it is not too much to say that Courts are astute to seize upon evidence tending to show either that such exemptions were not originally intended or that they have become inoperative by changes in the original constitution of the companies.

1 Nellis on St. Rys. sec. 168, citing:—
Yazoo v. M. V. Rys. Co. v. Adams, 180 U. S. 1, 44 L. Ed. 395,
Rochester v. Rochester R. Co. 182 N. Y. 99, 74 N. E. 953, 205 U. S. 236.

Exemption is not a franchise and therefore, does not pass as such to a purchaser of the corporate property.

1 Cooley on Taxation (3rd Ed.) 373.

An exemption from taxation is a privilege personal to the very corporation or other person to whom it is granted; it is not transferable or assignable; it is not a franchise; it does not run with the property after it passes from the owner to whom it was granted.

1 Desty on Taxation, 168,
Morgan v. Louisiana, 93 U. S. 217,
Wilson v. Gaines, 103 U. S. 417,
L. & N. R. Co. v. Palmes, 109 U. S. 244,
Memphis v. Berry, 112 U. S. 609,
C. & O. R. R. Co. v. Miller, 114 U. S. 176,
Picard v. R. Co., 130 U. S. 637, 32 L. Ed. 1052.

In Morgan v Louisiana, supra, the Court says:

"The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value; such as the franchise to run cars * * *. They are positive rights or privileges without the posses-

sion of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, incapable of transfer, without express statutory direction." Page 223.

In Wilson v. Gaines, supra, the Court says:

"In Morgan v. Louisiana (93 U. S. 217) we distinctly held that immunity from taxation was a personal privilege and not transferable, except with the consent or under the authority of the legislature which granted the exemption, or some succeeding legislature and that such exemption does not necessarily attach to or run with the property after it passes from the owner in whose favor the exemption was granted."

In Memphis v. Berry, supra, the Court says:

"The exemption from taxation must be construed to have been the personal privilege of the very corporation specially referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor. This statutory rule of interpretation is founded upon an obvious public policy, which regards such exemption as in derogation of the sovereign authority and of common right, and, therefore, not to be extended beyond the exact and express requirements of the grant construed strictissimmi juris."

In Picard v. R. R. Co., supra, the Court says:

"By this sale and the conveyance which followed, immunity from taxation did not pass. Such immunity is not in itself transferable. *It has been held, and the doctrine has been so often repeated that it is no longer an open question, that the Legislature of a State may exempt the property of particular persons or corporations from taxation, either for a limited period or perpetually; but to justify the conclusion that such exemption is granted, it must*

appear by language so clear and unmistakable as to leave no doubt of the purpose of the Legislature. The power of taxation is one of the highest attributes of sovereignty, and the suspension of its exercise as to any persons or property is not a matter to be presumed or inferred. It must be declared or it will not be deemed to exist. If the Legislature can lay aside a power devolved upon it for the good of the whole people of the State for the benefit of a private party, it must speak in such unmistakable terms that they will not admit of any reasonable construction consistent with the reservation of the power. The Delaware Railroad Tax 18 Wall. 206, 225 (21: 888, 894.)

Yielding to the doctrine that immunity from taxation may be granted, that point being already adjudged, it must be considered as a personal privilege not extending beyond the immediate grantee, unless otherwise so declared in express terms. *The same considerations which call for clear and unambiguous language to justify the conclusion that immunity from taxation has been granted in any instance, must requqire similar distinctness of expression before the immunity will be extended to others than the original grantee. It will not pass merely by a conveyance of the property and franchises of a railroad company, although such company may hold its property exempt from taxation.* As we said in Morgan v. Louisiana, 93 U. S. 217, 223 (23: 860, 861): "The franchises of a railroad corporation are rights or privileges which are essential to the operation of the corporation, and without which its road and works would be of little value, such as the franchise to run cars, to take tolls, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privileges, without the possession of which the road or the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as part of the property of the company; the latter is personal, and incapable of transfer without express statutory direction."

The case of Rochester Railway Co. v. City of Rochester, 205 U. S. 236, 51 L. Ed. 784, reviews the United States

Supreme Court cases on this subject extensively. Justice Moody in the opinion of the Court in that case said:—

"This Court has frequently had occasion to decide whether an immunity from the exercise of governmental power which has been granted by contract to one has, by legislative authority, been vested in or transferred to another, and in the decisions certain general principles, which control in the determination of the case at bar, has been established. *Although the obligations of such a contract are protected by the Federal Constitution from impairment by the state, the contract itself is not property, which, as such, can be transferred by the owner to another, because being personal to him with whom it was made, it is incapable of assignment. The person with whom the contract is made by tha state may continue to enjoy its benefits unmolested as long as he chooses, but there his rights end, and he cannot, by any form of conveyance, transmit the contract or its benefits to a successor.* Morgan v. Louisiana, 93 U. S. 217, 23 L. Ed. 860; Wilson v. Gaines, 103 U. S. 417, 26 L. Ed. 401; Louisville & N. R. Co. v. Palmes, 109 U. S. 244, 27 L. Ed. 922, 3 Sup. Ct. Rep. 193; Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. Ed. 1051, 9 Sup. Ct. Rep. 640; St. Louis & S. F. R. Co. v. Gill, 156 U. S. 649, 39 L. Ed. 567, 15 Supt. Ct. Rep. 484; Norfolk & W. R. Co. v. Pendleton, 156 U. S. 667, 39 L. Ed. 584, 15 Sup. Ct. Rep. 413. *But the state, by virtue of the same power which created the original contract of exemption, may, either by the same law or by subsequent laws, authorize or direct the transfer of the exemption to a successor in title. In that case the exemption is taken, not by reason of the inherent right of the original holder to assign it, but by the action of the state in authorizing or directing its transfer. As in determining whether a contract of exemption from a governmental power was granted, so in determining whether its transfer to another was authorized or directed, every doubt is resolved in favor of the continuanc e of the governmental power, and clear and unmistakable evidence of the intent to part with it is required.*

Keeping these fundamental principles steadily in mind, we proceed to enquire whether the state of New York has authorized or directed the transfer from the Brighton Railroad to the Rochester Railroad of the contract of exemption. *A legislative authorization of the transfer of "the property and franchises" (Morgan v. Louisiana and Picard v. East Tenessee V. & G. R. Co. ubi supra); of "the charter and works" (Memphis & L. R. R. Co. v. Berry)*, 112 *U. S.* 609, 28 *L. Ed.* 837, 5 *Sup. Ct. Rep.* 299)*; or of "the rights of franchise and property" (Norfolk & W. R. Co. v. Pendleton ubi supra), is not sufficient to include an exemption from the taxing or other power of the state, and it cannot be contended that the word "estate," has any larger meaning. It is, however, argued that the word "privileges" is sufficiently broad to embrace within its meaning such an exemption,* and that, when it is added to the other words, the legislative intent to transfer the exemption is clearly manifested, and that the words of the law under consideration, "the estate, property, rights, privileges, and franchises," indicate the purpose to vest in the purchasing corporation every asset of the selling corporation which is of conceivable value.

In the case of the Chesapeake & O. R. Co. v. Miller, 114 U. S. 176, 29 L. Ed. 121, 5 Sup. Ct. Rep. 813, it was held that the foreclosure of a mortgage on railroad property under the provisions of a statute which authorizzed the purchaser under a forclosure sale to become a corporation, and provided that it should "succeed to all such franchises, rights, and privileges" as were possessed by the mortgagor company, did not vest in the purchasing corporation an immunity from taxation.

In Picard v. East Tennessee, V. & G. R. Co. 130 U. S. 637, 32 L. Ed. 1051, 9 Sup. Ct. Rep. 640, Mr. Justice Field, in delivering the opinion of the court, said: "The later, and, we think the better, opinion is that unless other provisions remove all doubt of the intention of the legislature to include the immunity in the term 'privilege,' it will not be so construed. It can have its full force by confining it to other grants to the corporation."

In Wilmington & W. R. Co. v. Alsbrook, 146 U. S. 279, 36 L. Ed. 973, 13 Sup. Ct. Rep. 72, Mr. Chief Justice Fuller, in delivering the opinion of the court, said, on page 297, L. Ed. page 979, Sup. Ct. Rep. page 77: "We do not deny that exemption from taxation may be construed as included in the word 'privilege' if there are other provisions removing all doubt of the intention of the legislature in that respect."

In Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. Ed. 450, 14 Sup. Ct. Rep. 592, Mr. Justice Brown, in delivering the opinion of the court, said: "Whether, under the name 'franchises and privileges,' as immunity from taxation would pass to the new company, may admit of some doubt, in view of the decisions of this court, which upon this point, are not easy to be reconciled."

These conflicting views were before the court in Phoenix F. & M. Ins. Co. v. Tennessee, 161 U. S. 174, 40 L. Ed. 660, 16 Sup. Ct. Rep. 471. The plaintiff in error in that case claimed to have an immunity from taxation by virtue of a provision in its charter granting it "all the rights and privileges" of the De Soto Insurance Company, which had an immunity from taxation by virtue of a provision in its charter granting it "all the rights, privileges, and immunities" of the Bluff City Insurance Company, whose charter contained an expressed immunity from taxation. Mr. Justice Peckham, in delivering the opinion of the court, stated the question for decision in these words: "Is immunity from taxation granted to plaintiff in error under language which grants 'all the rights and privileges' of a company which has such immunity?" Much significance was given to the fact that the word "immunity," which clearly includes an exemption, was used in the charter of the De Soto Company, and not used in the charter of the plaintiff in error, granted seven years later. But the decision was not rested on this circumstance, although the omission was thought to cast a grave doubt upon the plaintiff's claim. The opinion reviews all the cases, cites the foregoing quotations from the opinions of Mr. Justice Brown, Mr. Justice Field, and of the Chief Justice, and, after saying: "There must be other language than the mere word 'privi-

lege,' or other provisions in the statute removing all doubt as to the intention of the legislature before the exemption will be admitted," concludes that: "If this were an original question we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the present time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach."

In Gulf & S. I. R. Co. v. Hewes, 183 U. S. 66, 46 L. Ed. 86, 22 Sup. Ct. Rep. 26, Mr. Justice Brown, in delivering the opinion of the court, said, citing this case as authority: "The better opinion is that a subrogation to the 'rights and privileges' of a former corporation does not include an immunity from taxation."

We think it is now the rule, notwithstanding earlier decisions and dicta to the contrary, that a statute authorizing or directing the grant or transfer of the "privileges" of a corporation which enjoys immunity from taxation or regulation should not be interpreted as including that immunity. We, therefore, conclude that the words "the estate, property, rights, privileges, and franchises" did not embrace within their meaning the immunity from the burden of paying enjoyed by the Brighton Railroad Company.

In Dillon on Municipal Corporations (5th Ed.) Vol. 4. Sec. 1401, it is said:—

"A statutory exemption of a railroad or other corporation from taxation, even if it be a contract protected against impairment by the federal Constitution, *is personal to the corporation* (the italics are the author's) to which the grant is made, and can only be transferred to or devolved upon another corporation by express legislative authority. * * * The transfer from one corporation to another, pursuant to statutory authority therefor, of the estate, property, rights, privielges and franchises of the grantor, without any language in the statute, expressly authorizing the transfer of *exemptions* or *immunities*, will not vest in the

grantee a legislative contract with the grantor of immunity from taxation or assessment."

The sale under these mortgages took place under the provisions of the Code of Virginia of 1860, chapter 61, sections 28 and 29, and the Parkersburg Branch Railroad Company came into being by virtue thereof, as is clearly shown by the terms of the deed of April 3, 1865.

By these sections of the Code it is provided:

"Sec. 28. In a sale made under a deed of trust or mortgage, executed by a company on all its works and property, and there be a conveyance pursuant thereto, *such sale and conveyance shall pass to the purchaser at the sale, not only the works and property of the company, as they were at the time of making the deed of trust, or mortgage, but any works which the company, may, after that time and before the sale, have constructed, and all other property of which it may be possessed at the time of the sale,* other than debts, due to it. *Upon such conveyance to the purchaser, the said company shall ipso facto be dissolved.* And the said purchaser shall forthwith set forth in the said conveyance or in any writing signed by him and recorded in the court in which the conveyance shall be recorded.

"Sec. 29. *The corporation created by or in consequence of such sale and conveyance shall succeed to all such franchises, rights and privileges and perform all such duties as would have been had or should have been performed, by the first company* but for such sale and conveyance; save only that *the corporation so created shall not be entitled to the debts due to the first company, and shall not be liable for any debts of or claims against the said first company, which may not be expressly assumed in the contract of purchase,* and that the whole profits of the business done by such corporation shall belong to the said purchaser and his assigns. His interest in the corporation shall be personal estate, and he or his assigns may create so many shares of stock therein as he or they may think proper, not

exceeding together the amount of stock in the first company at the time of the sale, and assign the same in a book to be kept for that purpose."

These identical sections were construed by the Supreme Court of the United States in the case of C. and O. R. R. Co. v. Miller, 114 U. S. 176, 29 L. Ed. 120, as follows:

It is earnestly contended, on behalf of the plaintiff in error, that by virtue of this language, it is entitled to enjoy the property formerly belonging to the Chesapeake and Ohio Railroad Company, its predecessor, precisely as though it had been incorporated under the charter of that company, and therefore with the exemption from taxation which was conceded to that company. But, broad, general and comprehensive as the language is, we cannot, in reference to the subject matter now in hand, apply it with that force and meaning. The words used are, it will be observed, *"franchises, rights and privileges," * * * as would have been had * * * "by the first company, but for such sale," etc. There is no express reference to a grant of any exemption or immunity; nothing is said in relation to the subject of taxation. The words actually used do not necessarily embrace a grant of such an exemption.* As was said, on this point, in Morgan v. Louisiana, 93 U. S. 217-223 (bk. 23 L. Ed. 860, 862) : "Much confusion of thought has arisen in this case and in similar cases from attaching a vague and undefined meaning to the term "franchise." It is often used as synonymous with rights, privileges and immunities, though of a personal and temporary character; so that, if any one of these exists, it is loosely termed a 'franchise,' and is supposed to pass upon a transfer of the franchises of the company. But the term must always be considered in connection with the corporation or property to which it is alleged to appertain. The franchises of a railroad corporation are rights or privileges which are essential to the operations of the corporation, and without which its road and works would be of little value; such as the franchise to run cars, to take tools, to appropriate earth and gravel for the bed of its road, or water for its engines, and the like. They are positive rights or privi-

leges, without the possession of which the road of the company could not be successfully worked. Immunity from taxation is not one of them. The former may be conveyed to a purchaser of the road as a part of the property of the company; the latter is personal and incapable of transfer without express statutory direction."

Here, there is no such express statutory direction. Nor is there an equivalent implication by necessary construction. There is nothing in the language itself, nor the content, nor the subject matter of the legislation, nor the situation and relation of the parties to be affected, which indicates that a grant of an exemption from taxation to a particular railroad corporation, or to a class of such, was in the contemplation of the Legislature. *The subject matter of this legislation was not the original construction of railroads, but the operation of railroads already constructed. The State was not in the attitude of a contractor, soliciting subscriptions of capital, in the formation of companies to undertake the risk of public improvements, for the benefit of the State, with the hazard of loss and perhaps financial ruin to the first promoters, and offering exemptions from taxation as a consideration, by way of contract, for the acceptance of its proposals. It was legislating in reference to enterprises already undertaken, prosecuted and completed by companies originally thus incorporated, and who, by reason of insolvenvy, had been stripped of their property by creditors and sentenced by the law to dissolution; and the purpose of the statute was simply to provide suitable means of incorporating the purchasers to facilitate their use of the property, in operating it for the benefit of the public, as designed from the beginning. These purchasers had not bought the immunity now demanded either from the State or the prior posessor.* The contract of the creditors would be fully met, on failure payment of the stipulated debt, by subjecting to sale the property pledged for its payment, with such rights, franchises and privileges only as were necessary for its beneficial use and enjoyment. The immunity from taxation, as we have alreay said, was not necessarily included in that designation. *The debtor corporation, and its creditors combined, could not confer upon the purchasers any rights which were not assignable;*

and, as no consideration moved to the State for renewal of the grant, there is no motive for finding, by mere construction and implication, what the words of the law have failed to express. That certainly is not a reasonable interpretation for which no sufficient reason can be assigned.

We conclude, therefore, that the Act from which the Plaintiff in error derives its corporate existence and powers in West Virginia does not contain a renewal of the grant by exemption from taxation, which, in the 7th section of the Act of March 1, 1866, applied to the Chesapeake and Ohio Railroad Company.

Were it otherwise, so that we should be constrained to hold that the langauge of the Act of West Virginia of February 20, 1877, had the force of a grant to the plaintiff in error of the exemption of taxation vested by the 7th section of the Act of March 1, 1866 in the Chesapeake and Ohio Railroad Company, nevertheless we should be compelled also to hold on distinct grounds, that the exemption thus conferred did not take effect as a contract, protected from repeal by the Constitution of the United States. On the supposition now made, it would still be true, that all the rights of the plaintiff in error, as a corporation, other than the title to the property it acquired by the judicial sale, had their origin in and depended upon the Acts of 1871, 1877, under and by which it was created a Corporation. *It can, in no sense, be regarded as the identical corporate body of which it became the successor, merely discharged by a process of insolvency from further liability for past debts, which is the view pressed upon us in argument by counsel for plaintiff in error. The language of the statute expressly contradicts this assumption. The old corporation in terms is dissolved. The purchasers are as explicitly declared to become a corporation, and its corporate powers are conferred by reference to those which had belonged to their predecessors. The language of the law, the reason involvd in its provisions and the precedents of cases heretofore decided by this court, foreclose further controversy on this point.* Shields v. Ohio, 95 U. S. 319 (bk. 24 L. Ed. 357); R. R. Co. v. Maine, 96 U. S. 499 (bk. 24 L. Ed. 836); R. R. Co. v. Georgia, 98 U. S. 359 (bk. 25 L. Ed. 185); R. R. Co. v. Palmes, 109 U. S. 244., (bk. 27, L. Ed. 922).

So it may be seen that the exemption, if valid, ceased with the Northwestern Virginia Railroad Company.

Railroad Co. v. Georgia, 98 U. S. 364,
Shields v. Ohio, 95 U. S. 323-324.

The exemption from taxation must be construed to have been the personal privilege of the very corporation, specifically referred to, and to have perished with that, unless the express and clear intention of the law requires the exemption to pass as a continuing franchise to a successor. This statutory rule of interpretation is founded upon an obvious public policy, which regards such exemption as a derogation of the sovereign authority and of common right not to be extended beyond the exact and express requirements of the grant, construed strictissimmi juris.

1 Cooley on Taxation (3rd Ed.) 1374.
Memphis R. Co. v. Com. 112 U. S. 609.

In the Memphis R. R. Co. case, a railroad exempted from taxation had elected to transfer its franchise to another corporation; which therefore claimed exemption and filed its bill to restrain taxation. The bill was dismissed. See also Lake Shore, etc. R. R. v. Grand Rapids, 102 Mich. 374.

We submit, therefore, (first) that the Town of Parkersburg in 1855, was entirely without power to grant to the Northwestern Virginia Railroad Company the alleged exemption from taxation; but (second) even if such exemption of the Northwestern Virginia Railroad Company's property had been valid, appellant never obtained the exemption through the Northwestern Virginia Railroad Company.

But let us look to see whether or not subsequent to June 8, 1855, the Town of Parkersburg had any dealings directly with the Parkersburg Branch Railroad Company

(or appellant) that could be taken to authorize or direct the transfer of the exemption.

POINT III.

The contract of June 8, 1855, in so far as it related to the subject of exemption from taxation, could not be rendered effective, or in force, by subsequent acts of ratification, either express or implied, because (1) it was ultra vires and void when made, and (2) the Town or City never had any more power in regard thereto than on June 8, 1855.

A. Heretofore we have shown that the alleged contract was ultra vires and void when made. (Point One.) Did the Town or City of Parkersburg ever obtain any additional authority relating to taxation whereby it might be claimed that it had power to grant the exemption direct to the Parkersburg Branch Railroad Company?

Let us remember, as said in the Rochester case, supra, that "as in determining whether a contract of exemption from a governmental power was granted, so in determining whether its transfer was authorized or directed, every doubt is resolved in favor of the continuance of the governmental power, and clear and unmistakable evidence of the intent to part with it is required."

Let us also remember that "where one relies upon an exemption from taxation, both *the power to exempt* and *the contract of exemption* must be clear. Any doubt or ambiguity must be resolved in favor of the public."

The City of Parkersburg had no more power to grant the exemption in 1865 than did the Town in 1855. The only authority in the city to tax property in 1865, is found in the city charter of 1860, section 15, which provides:

"The Council shall have authority to levy and collect an annual tax on the real estate, personal property and

tithables in the said town, and upon all other subjects of taxation under the revenue laws of the state; provided, that said tax does not exceed one per centum of the assessed value of said property, or the sum of two dollars upon every tithable therein."

This section has been construed to mean that all the personal property should be taxed.

Powell v. Parkersburg, 28 W. Va. 711-714.

That no discretion was left in the City under said charter to exempt any property is shown by the case of Bridge Co. v. Point Pleasant, 32 W. Va. 328, in which Judge Brannon says:—

Can the town tax this bridge crossing the river Ohio? We think it can,—so much of it as is within this State. It is property within the corporate limits of the town and the jurisdiction of the State. *The State constitution as to state taxation declares that "all property, both real and personal, shall be taxed in proportion to its value." This means, that all property must be taxed. Railroad Co. v. Miller*, 19 *W. Va.* 408. Section 9, art. X of the constitution provides, that "the Legislature may by law authorize the corporate authorities of cities, towns and villages for corporate authorities of cities, towns and villages for corporate purposes to assess and collect taxes." Under this section the Legislature has by the Code c. 47, s. 31 directed, that the tax-levy "shall be upon all dogs in the said city, town or village and upon all the real and personal estate therein subject to state and county taxes. *Property subject to state taxation being thus made expressly subject to town taxation, it follows, that this bridge is not only liable to taxation for town purpsoes, but that it must be taxed, the council having no discretion to exempt it, every tax-paying owner of other property having the right to demand its taxation.*

This statute also provides that the tax should be an annual tax. This of itself is a prohibition upon a commu-

tation of city taxes forever for a sum in gross.
1 Desty on Taxation, 487 and 44 3and 257.

Where a statute confers a power upon a corporation to be exercised for the public good, its exercise is not merely discretionary, but imperative. The words "powers" and "authority," in such cases may be construed "duty" and "obligation." Where a power is expressly given, no other or different means can be implied.

As has been before shown, the city had no authority to grant exemptions unless the authority was unmistakably conferred by the legislature; and that none existed in 1865.

No change was made between the years 1865 and March 15, 1870, except that by the Code of 1868, sections 30 and 31, which went into effect April 1, 1869, (which was an amendment to the city charter of 1860, Powell v. Parkersburg, 28 W. Va. 699), it was provided:—

"The council shall cause to be annually made up and entered upon its journal, an accurate estimate of all sums which are, or may become lawfully chargeable on such town or village, and which ought to be paid within one year, and it shall order a levy of so much as may, in its opinion, be necessary to pay the same.

"The levy so ordered shall be upon all dogs in the said town or village, and upon all the real and personal estate therein, subject to State and county taxes; provided that the taxes so levied upon property shall not exceed one dollar on every one hundred dollars of the value thereof."

We submit under all of the authorities heretofore cited, that the City at no time had the authority to grant this alleged exemption.

B. We have already seen that the act of the town in

granting this exemption was ultra vires and void. It was not merely illegal, not merely wrongful; it was void. What was the effect of the provision of the ordinance passed by the City May 30, 1865?

Section 3 of the ordinance of May 30, 1865, (Printed record, page 23) was as follows:—

Permission is hereby further given to the said company to use steam or other power for drawing or propelling their cars and trains over any railroad track, the construction and use wheeof is authorized or intended to be authorized by this or any future ordinance, subject as to such construction and use to all the provisions and restrictions, so far as applicable of an ordinance of the President, Recorder and Trustees of the town of Parkersburg, entitled "An ordinance to permit the Northwestern Virginia Railroad Company to lay rails along certain streets of the town, and for other purposes," passed October 25, 1852, *which, together with the deed of conveyance and agreement between the said President, Recorder and Trustees, and the said Northwestern Virginia Railroad Company, bearing date on the 8th day of June, in the year one thousand eight hundred and fifty-five, and of record in the County of Wood, and State of West Virginia, and all other ordinances and parts of ordinances heretofore passed by the said town, and accepted by the Northwestern Virginia Railroad Company, and not repealed, are hereby declared to be in full force and binding on the City of Parkersburg, and the said Parkersburg Branch Railroad Company as the successors, respectively of the former parties thereto.*

Attention is called to the fact that not a single word is said about exemptions or immunities.

Exemption from taxation must be looked for in the language of the instrument, and, if not found there, should not be inserted by construction.

-Bank v. Billings, 4 Pet. 514, 7 L. Ed. 956.

"There having been a total want of power to issue the bonds originally, under any circumstances, and not a mere failure to comply with prescribed requirements or conditions, the case is not one for applying to the City, under any state of facts, any doctrine of estoppel or ratification, by reason of its having paid some installments of interest on the bonds. Loan Association v. Topeka, 20 Wall. 655, 22 L. Ed. 461."

Parkersburg v. Brown, 106 U. S. 487, 27 L. Ed. 244.

Exemption from taxation is never to be assumed unless the language used is too clear to admit of doubt. Nothing can be taken against the city.

Wilmington R. R. Co. v. Reid, 13 Wall. 264;
Picard v. R. R. Co., 130 U. S. 637;
Wilmington v. Alsbrook, 146 U. S. 279.

The grant to one company of the rights and privileges of another, for the purpose of making and using a railroad, carries with it only such rights and privileges as were essential to the operations of the company.

Morgan v. Louisiana, 93 U. S. 217;
Picard v. R. R. Co., 130 U. S. 637;
C. & O. R. R. Co. v. Miller, 114 U. S. 175;
Memphis v Gaines, 97 U. S. 697.

Immunity from taxes is not one of these.

In Loan Company v. Topeka, 20 Wall. 655, 22 L. Ed. 461, it is said that subsequent acts of ratification, acquiescence or knowledgment are just as illegal as the contract they purport to support.

"Where the contract is one which the City could not make and which is therefore ultra vires, no subsequqent act of the municipal corporation will prevent it from denying the validity of such contract."

State v. Murphy, 134 Mo. 547; 34 L. R. A. 369, and cases cited.

"No acquiescence or waiver will estop the municipal corporation from denying the validity of an act beyond the scope of its corporate powers."

Cedar Rapids Water Co. v. Cedar Rapids, 90 N. W. 746.

"A subsequent ratification cannot make valid an unlawful act without the scope of corporate authority."

Dillon on Municipal Corporations, Vol. 2, sec. 797.

"Ratification is inoperative if the party attempted to be charged was not competent to make the contract in question when he same was made, nor when the supposed acts of ratification were performed."

Supervisors etc. v. Schenck, (U. S.) 18 L. Ed. 856.

If the City did not have the power to contract in the way and form it attempted to do, then subsequent acts cannot make valid what is ultra vires and void.

Westminister Water Co. v. Westminister, 98 Md. 551, 57 Atl. 990, 103 Am. St. Rep. 424, 64 L. R. A. 630;
Dill. Mun. Corp. sec. 457;
N. Cr. Co. v. Balt. 21 Md. 93;
Rittenhouse v. Balt. 25 Md. 336;
State ex rel Baltimore v. Kirkly, 29 Md. 85;
State ex rel McCullan v. Graves, 19 Md. 351, 81 Am. Dec. 639;
Baltimore v. Reynolds, 29 Md. 1;
Baltimore v. Esbach, 18 Md. 283;
Horn v. Baltimore, 30 Md. 223;
Baltimore v. Musgrave, 48 Md. 272, 30 Am. Rep. 458;
Mealey v. Hagerstown, 92 Md. 741, 48 Atl. 746;
Bear Creek Fertilizing Co. v. Baltimore, 87 Md. 97, 39 Atl. 550;
Pickard v. Hayes, 94 Md. 252, 51 Atl. 32;
Baltimore v. Porter, 18 Md. 284, 79 Am. Dec. 686;
Mullen v. California, 114 Cal. 578, 46 Pac. 670, 34 L. R. A. 262;
Mulford v. Mulford Water Co. 124 Pa. 610, 17 Atl. 185, 3 L. R. A. 122.

On May 10, 1867, the City passed an ordinance (Printed record, page 23) in which it granted the Company the use of Sixth Street, to close and appropriate Saint Cloud Alley, and donated to the Railroad Company fifteen thousand dollars for costs incident to widening Sixth Street so as to accommodate the piers and abutments of the railroad.

By section four of that ordinance it is provided, "The permission and privileges granted by this ordinance are upon the following terms and conditions, and not otherwise, namely: That the said Parkersburg Branch Railroad Company shall, without unnecessary delay, proceed to the construction of the wharf at the foot of Court street," etc. It was also provided that the ordinance should have no force or effect until the same was accepted by the railroad. By writing appended to the ordinance the Railroad accepted its provisions, "and do hereby agree that this acceptance and assent, together with the said ordinance, shall have all the force and effect of a contract or agreement between the said Company and the said City."

This was the only agreement by which the Parkersburg Branch Railroad ever undertook the building of the wharf at the foot of Third Street; and it undertook it at this time, not because the North Western Virginia had agreed to do so ten years before, but because of present franchises granted and $15,000.00 donated. It expressly says that upon no other consideration, and this was the only condition, would the ordinance become effective.

Although the Railroad Company, with all the solemnity and formality which a legislative contract could impose, agreed on May 10, 1867, to construct the wharf "without unnecessary delay" and complete the same "on or before the first day of December, in the year one thousand, eight hundred and sixty-eight," yet work of construction had not

started on March 15, 1870—sixteen and one half months after time within which it had agreed to complete it. The only apparent reason for bringing up the wharf question at this time, March 15, 1870, was that the Railroad wanted more franchises from the City. Thus the opportunity was presented of obtaining franchises vital to its undertaking, and, at the same time, for the reasonable consideration of these franchises, escape the burden of building that wharf at the foot of Third Street. So the Railroad offered the City $7500 for these new franchises and a release from building the wharf. The City must have become convinced by this time that if it ever got that wharf it would have to build it itself, and as $7500 was a fair value for the franchises requested, it accepted the proposition of the railroad. This was carried into effect by ordinance passed March 15, 1870, (Printed record, page 27). In reference to this the ordinance says in effect that if the railroad company pay to the City $7500 "The said sum shall be received as a performance and discharge of the terms and conditions of the fourth section of the ordinance passed May 10, 1867. * * * And the Parkersburg Branch Railroad Company shall, upon the payment of said sum of money, stand released and discharged from the building of the wharf at the foot of Court street on the Ohio River in said City, as required by the contract of agreement contained in the ordinance aforesaid."

Released from what contract? The contract of June 8, 1855, with the North Western Virginia, as now contended? In 1870 the railroad company said over the hand of its President that it was the contract of May 10, 1867, made with its own company; and in neither of these was the contract of June 8, 1855, ever referred to or in any wise recognized.

As has been before shown, the Parkersburg Branch

Railroad Company was an entirely new and distinct corporation from the Northwestern Virginia Railroad Company; that it acquired only such property as had been accumulated or was owned by the Northwestern Virginia Railroad Company at the date of the sale; that the Parkersburg Branch Railroad Company was in no way liable for the construction of the wharf at the foot of Court street; that the property acquired by the Northwestern Virginia Railroad company after the mortgages of 1853, and conveyed to the town of Parkersburg before the sale in 1865, was not affected by such sale, and that the Parkersburg Branch Railroad Company had no claim thereto; and that there was no mutual liabilities between the town and said Parkersburg Branch Railroad Company. It therefore follows that the ordinances of 1865 and 1867, and 1870 constituted a new contract between the Parkersburg Branch Railroad Company and the town, by which the town granted certain new and valuable franchises to the railroad and attempted to renew the exemption from taxation upon the Northwestern Virginia Railroad property in consideration of $7,500.00.

But as heretofore shown (insofar as it is claimed that they related to the subject of exemption from taxation) these ordinances were void for want of power.

The Circuit Court of Appeals passed upon this point in this case in the following language (Printed record, page 167);

"The Baltimore & Ohio Railroad Company avers that even if this be true it was exempted from taxation by the ordinances of May 30, 1865, and May 10, 1867, passed after the foreclosure sale.

"Assuming, without deciding, the requirement of the constitution of West Virginia of 1863 that all taxation shall be equal and uniform to apply only to taxation by the state

and not so that by municipal corporations, we think the city ordinances of May 30, 1865 and May 10, 1867 are unavailing to protect the Baltimore & Ohio Railroad Company from taxation. These ordinances in general terms declare the ordinance of June 8, 1855, and all other ordinances accepted by the North Western Virginia Railroad Company and not repealed, to be binding on the city and on the Parkersburg Branch Railroad Company, "as the successors to the former parties thereto." No mention is made of exemption from taxation attempted by the ordinance of June 8, 1855. These ordinances fail to relieve the Baltimore and Ohio Railroad Company of its taxes for total want of power in the council to exempt from taxation."

"It follows that all the attempts of the municipal council by ordinances and contract to exempt the railroad company from taxation were absolutely void."

It is of further interest to note in this regard that appellant contends that the payment of the sum of $7500 under the ordinance of 1870 (Printed record, page 27) was a sort of commutation of taxes and that the City cannot now repudiate the contract even though it was without power to enter into it.

This theory is exploded by the case of Ottawa v. Carey, 108 U. S. 110, 27 L. Ed. 669, in the sixth syllabus of which it is said:—

"Unless the specific power is granted to a municipal corporation to make subscriptions to capital stock or donations to corporations, for public improvements, all such subscriptions, and all such donations, as well as the corporate bonds issued for their payment, are absolutely void, even as against bona fide holders of the bonds."

And in Thomas v. Richmond, 12 Wall. 452, 20 L. Ed. 457, it was said:—

But, in the case of municipal and other public corpora-

tions, another consideration intervenes. They represent the public, and are themselves to be protected against the unauthorized acts of their officers and agents, when it can be done without injury to third parties. This is necessary in order to guard against fraud and speculation. Persons dealing with such officers and agents are chargeable with notice of the powers which the corporation possesses, and are to be held responsible accordingly. The issuing of bills as a currency by such a corporation without authority is not only contrary to positive law, but, being ultra vires, is an abuse of the public franchises which have been conferred upon it; and the receiver of the bills, being chargeable with notice of the wrong, is inpari delicto with the officers, and should have no remedy, even for money had and received, against the corporation upon which he had aided in inflicting the wrong. The protection of public corporations from such unauthorized acts of their officers and agents is a matter of public policy in which the whole community is concerned. And those who aid in such transactions must do so at their peril.

Therefore, we submit that the exemption having been void when made, could not be made alive by any subsequent act of the parties thereto.

ISSUE II.

THE CITY OF PARKERSBURG HAS NOT LOST THE RIGHT TO COLLECT TAXES ON THE PROPERTY OF THE BALTIMORE AND OHIO RAILROAD COMPANY SITUATED IN THE CITY OF PARKERSBURG AND SAID PROPERTY IS NOT PERPETUALLY FREE FROM CITY TAXATION BY REASON OF ADJUDICATION OF JULY 13, 1897, THAT THE ATTEMPFED EXEMPTION WAS VALID.

The decree entered in this cause on the 13th day of July, 1897, was as follows (Printed record, page 104) :—

"The Court having maturely considered the demur-

rers of the defendants heretoftore filed by them in this cause to the original and amended and supplemental bill herein is of the opinion that the same are not well taken.

"It is, therefore, adjudged, ordered and decreed that said demurrers and each of them, be, and the same are hereby, overruled.

"And thereupon came the defendants and asked leave to file their separate answers, heretofore tendered in this cause, to the original bill and the same being considered by the Court are ordered filed, and leave is given them to file answers to said amended and supplemental bill within thirty days from this date."

The Circuit Court of Appeals disposed of this point in the following language (Printed record, page 168) and we take our stand upon their opinion:—

"The city has not lost its right to collect the tax by adverse adjudication in this litigation. An order or decree on a demurrer and the entry of final judgment thereon is an adjudication of a point involved. *Bissell v. Spring Valley Township*, 124 *U. S.* 225; *Wiggins Ferry Co. v. Ohio & Mississippi Railway*, 142 *U. S.* 396. But an order overruling a demurrer is not an adjudication of the merits when there is no final decree or judgment and leave is granted to file an answer raising the same question made by the demurrer. Here, in overruling the demurrer to the bill, the defendant was given leave to file an answer putting in issue questions made by the demurrer. This was refusing to decide the issue on demurrer, leaving it for decision on the final hearing.

"A demurrer to a complaint because it does not state facts sufficient to constitute a cause of action, is equivalent to a general demurrer to a declaration at common law, and raises an issue which, when tried, will finally dispose of the case as stated in the complaint, on its merits, *unless leave to amend or plead over is granted.* The trial of such an issue is the trial of the cause as a cause, and not the settlement of a mere matter of form in proceeding. There can be no other trial except at the discretion of the court, and

if final judgment is entered on the demurrer, it will be a final determination of the rights of the parties which can be pleaded in bar to any other suit for the same cause of action. Under such circumstances, the trial of an issue raised by a demurrer which involves the merits of the action is, in our opinion, a trial of the action within the meaning of the act of March 3, 1875. *Alley v. Nott*, 111 *U. S.* 472, 475; *Virginia v. West Virginia*, 206 *U. S.* 290; *Kansas v. Colorado*, 185 *U. S.* 125; *Anderson v. Olson*, 188 *Ill.* 502, 59 *N. E.* 239; *Foster-Eddy v. Baker*, 192 *Fed.* 624.
The limitation of the general doctrine expressed in the words we have italicized applies. The rights of the parties were, therefore, unadjudicated and the cause was pending for trial when the final decree for a permanent injunction was entered February 7, 1923."

ISSUE III.

THE CITY OF PARKERSBURG HAS NOT LOST THE RIGHT TO COLLECT TAXES ON THE PROPERTY OF THE BALTIMORE AND OHIO RAILROAD COMPANY SITUATED IN THE CITY OF PARKERSBURG, AND SAID PROPERTY IS NOT PERPETUALLY FREE FROM CITY TAXATION BY REASON OF LACHES OF THE CITY IN ACQUIESCING IN THE ASSERTION OF THE VALIDITY OF THE EXEMPTION FROM 1855 TO 1893, AND FROM 1897 TO 1921.

In Dillon on Municipal Corporations (4th Ed.), Volume I, section 548, it is said:—

AS EXPERIENCE SHOWS THAT THE OFFICERS OF PUBLIC AND MUNICIPAL CORPORATIONS DO NOT GUARD THE INTEREST CONFIDED TO THEM WITH THE SAME VIGILANCE AND FIDELITY THAT CHARACTERIZE THE OFFICERS OF PRIVATE CORPORATIONS, THE PRINCIPLE OF RATIFICATION BY LACHES OR DELAY SHOULD BE MORE CAUTIOUSLY APPLIED TO THE FORMER THAN TO THE

LATTER. But the principle applies to both classes of corporations, as well as to natural persons. THE GENERAL DOCTRINE IS UNDOUBTED, THAT THERE IS ORDINARILY NO ESTOPPEL IN RESPECT TO ACTS WHICH ARE IN VIOLATION OF THE CONSTITUTION OR OF AN ACT OF THE LEGISLATURE, OR WHICH ARE OBVIOUSLY AND IN THE STRICT AND PROPER SENSE OF THE TERM, ULTRA VIRES. The history of the doctrine of ultra vires in Great Britain and in this country makes it difficult to affirm that the rule is without exceptions; and it is the part of prudence and wisdom to keep close to the adjudications without undertaking to formulate in advance rules of universal application. Precision is absolutely essential to legal conceptions. A LEGAL TERM WHICH STANDS FOR AN INDEFINITE IDEA OR FOR SEVERAL DIFFERENT IDEAS WILL NECESSARILY INTRODUCE CONFUSION WHEN USED WITHOUT QUALIFICATION; AND PERHAPS NO TERM IN THE LAW HAS BEEN MORE UNFORTUNATE IN THIS RESPECT THAN THE EXPRESSION ULTRA VIRES. WE MEAN BY IT, AS HERE USED, THE WANT OF LEGISLATIVE POWER, UNDER ANY CIRCUMSTANCES OR CONDITIONS, TO DO THE PARTICULAR ACT IN QUESTION.

The case of Bell v. Kirkland, 102 Minn. 213, 113 N. W. 271, 20 A. S. R. 621, very well distinguishes these classes of ultra vires contracts. It is said therein:—

The first of these (in speaking of certain cases) describes a contract which is not within the scope of the powers of a corporation to make under any circumstances, or for any purposes; for example, "Where a corporation authorized only to build a railroad engages in banking:" Mitchell J., in Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 36 N. W. 310. Where "the legislature, for instance, having authorized you to make a railway, you cannot go and make a harbor:" Kindersley, V. C., in Earl of Shrewsburg v. North Staffordshire, 35 L. J. Ch. 156, 172. *So, in the cases to which defendant refers us, it was held to be wholly outside of a city's power to surrender control*

over streets" (*State v. Minnesota Transfer Fy. Co.*, 80 *Minn.* 108, 83 *N. W.* 32, 50 *L. R. A.* 656), *to pay money to aid in building a shoe factory within its limits* (*City of Chaska v. Hedman*, 53 *Minn.* 525, 55 *N. W.* 737); to aid in the construction of a dam for the purpose of improving a water power (Coates v. Campbell, 37 Minn. 498, 35 N. W. 366); to construct a building for the use of another municipality or other third person (Borough of Henderson v. County of Sibley, 28 Minn. 515, 11 N. W. 91; Village of Glencoe v. County of McLeod, 40 Minn. 44, 41 N. W. 239); or without authority to buy real estate (Bazille v. Board of Comrs. of Ramsey County, 71 Minn. 198, 73 N. W. 845). For further illustrations, see Ingersoll v. Public Corporations, 292, 293. The second of these meanings refers to contracts of a class which the corporation had a right to execute, but with respect to which there has been some irregularity or defect in the actual exercise of the power "in some particular or through some undisclosed circumstance" affecting the individual contract in issue.

The former class is ultra vires in the primary, and really only proper, use of the term while in the second it is merely secondary: Mitchell, J., in Minnesota Thresher Mfg. Co. v. Langdon, 44 Minn. 37, 46 N. W. 310. That is to say, an ultra vires municipal contract, in its true sense, is a contract relating to matters wholly outside the charter powers of a corporation: 2 Dillon on Municipal Corporations, secs. 935, 936. In Miners D. Co. v. Zellerbach, 37 Cal. 543, 99 Am. Dec. 300, Sawyer, C. J., justly remarked: "These distinctions must be constantly borne in mind in considering a question arising out of dealings with a corporation. *When an act is ultra vires in the first sense mentioned, it is generally, if not always, void in toto,* and the corporation may avail itself of the plea. But, when it is ultra vires in the second sense, the right of the corporation to avail itself of the plea will depend upon the circumstances of the case;" And see City of Valparaiso v. Valparaiso City W. Co., 30 Ind. App. 316, 65 N. E. 1063; Rogers v. City of Omaha (Neb.) 107 N. W. 214; 5 Thompson on Corporations, sec. 936; 2 Current Law, 977.

Without question, the case at bar belogns to the first of these classes, for it was not within the scope of the

Town's powers under any circumstances, or for any purposes, to enter into the contract of exemption. Consequently, so much of said contract as relates to exemption is void in toto, and could not be validated by acquiescence or laches on the part of the agents of the Town.

Volume one of Cyc. at page 630 defines "Acquiescence" as: "A resting satisfied with or submission to an existing state of things. The term implies both knowledge AND POWER TO CONTRACT on the part of the party acquiescing."

"Acquiescence—that is, assent—is tantamount to an agreement. It is an implied contract, and IT REQUIRES FOR ITS VALIDITY POWER TO CONTRACT."
Matthews v. Munchison, 17 Fed. 760, 766.

In Loan Company v. Topeka, 20 Wall. 655, 22 L. Ed. 461, it is said that subsequent acts of ratification, acquiescence or acknowledgment are just as illegal as the contract they purport to support.

"Where the contract is one which the City could not make and which is therefore ultra vires, no subsequent act of the municipal corporation will prevent it from denying the validity of such contract."
State v. Murphy, 134 Mo. 547; 34 L. R. A. 369, and cases cited.

"No acquiescence or waiver will estop the municipal corporation from denying the validity of an act beyond the scope of its corporate powers."
Cedar Rapids Water Co. v. Cedar Rapids, 90 N. W. 746.

"A subsequent ratification cannot make valid an unlawful act without the scope of corporate authority."

Dillon on Municipal Corporation, Vol. 2, sec. 797.

"Ratification is inoperative if the party attempted to be charged was not competent to make the contract in question when the same was made, nor when the supposed acts of ratification were performed."

Supervisors etc. v. Schenk, (U. S.) 18 L. Ed. 556.

In 28 Cyc. at page 675, it is said:—

"An illegal or ultra vires municipal contract, being void, is not susceptible of validation, unless meanwhile the legislature has conferred upon the corporation power to ratify or to make such contracts."

As heretofore shown the Town or City of Parkersburg has never had the power to ratify or make contracts of exemption from taxation.

In Ruling Case Law at page 1074, it is said:—

"It is clear that the attempted ratification by a municipal corporation of a contract which it has no power to enter into is ineffectual, and cannot render the contract a binding obligation."

The rights of municipal corporations are not lost by laches of its officers.

53 Am. Dec. 503 (note, citing cases.)

A delay to tax, no matter how long continued, cannot destroy or impair the right of taxation. This right is never barred by non-user or barred by prescription.

J. W. Perry Co. v. Norfolk, 220 U. S. 472, 55 L. Ed. 548 (114 years),

Wells v. Mayor of Savannah, 181 U. S. 531, 45 L. Ed. 986, (88 years),
Vicksburg etc. R. Co. v. Dennis, 29 L. Ed. 770.

In the case of J. W. Perry Company v. Norfolk, 220 U. S. 472, 55 L. Ed. 548, where a contractual relationship existed between the parties (as is claimed in the case at bar), the contract taking effect August 26, 1792, and where J. W. Perry and Company was claiming exemption from taxation under said contract, no attempt was made to collect taxes by the City from 1792 until the year 1906, a period of one hundred and fourteen years, yet even in that case the Supreme Court of the United States refused to grant the exemption, applying the doctrine that where one relies upon an exemption from taxation, both the power to exempt and the contract of exemption must be clear. Any doubt or ambiguity must be resolved in favor of the public.

In the Perry Case, as in the case at bar, the City did not have power to grant the exemption.

In Wells v. Mayor of Savannah, 181 U. S. 531, 45 L. Ed. 986, where a contractual relationship existed, property was not taxed from 1790 to 1878, yet the exemption was not allowed.

Nor can it be said that the City abandoned its claim in suit (as was contended by appellant in the court below).

The City could not abandon a suit instituted against it by the appellant, the Baltimore and Ohio Railroad Company.

"A case is not abandoned or discontinued so long as it is kept on the docket."
Gombs v. Wallace, 3 Ky. Law Rep. 384.

"Unless the proper motion be made to dismiss an action for want of prosecution, the fact that both parties fail to bring the cause on for trial does not amount to an abandonment of the action by either."

McKenzie v. A. P. Cook Co., Ltd., 113 Mich. 452, 71 N. W. 868, (syl. 3).

The Baltimore and Ohio Railroad Company has not suffered by this lapse of time, its position has not been materially changed. Every year it could put off a Final Decree in this cause meant a saving to it of thousands of dollars in city taxes. The city cannot go further back under the statute in West Virginia than five years in the collection of taxes.

The Circuit Court of Appeals disposed of this question of laches in the following language (Printed record, page 168):—

"The argument is made that the city has lost its right to collect the tax for the year 1893, the tax enjoined, and taxes for all subsequent years as well, by laches, in that the municipal authorities failed to attempt to collect the taxes from 1855 to 1893, and after the temperory injunction, in 1897 failed to bring the cause on for a final hearing until 1921.

"When an act is within the general scope of municipal power, and is not expressly forbidden by law, the conduct of its officers may be attributed to a municipality as laches or estoppel according to circumstances. Illustrative cases are Bank v. Dandridge, 12 Wheat. 63, and Boone v. Burlington, 139 U. S. 684. But the attempt to exempt from taxes being entirely without the scope of its power, the council in attempting to confer exemption did not represent the municipality. The effort to bind the city by the attempt was of no more effect than would have been an effort by the council to legislate or make contracts for another municipality or the entire state. In that case no laches or attempt at ratification by the council could bind the city. "A contract of a corporation, which is *ultra vires*,

in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it." Central Transp. Co. v. Pullman's Palace Car Co. 139 U. S. 24, 50; Jacksonville etc. Railway v. Hooper, 160 U. S. 514, 524, 530; California Bank v. Kennedy, 167 U. S. 362, 368; Marsh v. Fulton County, 10 Wall. 676; Parkersburg v. Brown, 106 U. S. 487, 501; Daviess County v. Dickinson, 117 U. S. 657; Flowers v. Logan County, 137 A. St., Note, 357, 368, 375; Neacy v. Drew, 175 Wis. 348, 187 N. W. 218; Mayor of Hogansville v. Planters Bank, 27 Ga. App. 384, 108 S. E. 48; Milster v. Spartanburg, 68 S. C. 33; 2 Dillon on Municipal Corporations, (5th Ed.) sec. 951; Bigelow on Estoppel, (5th Ed.) 466.

"As to attempts to found a right of action on a void contract and acts done under it, the Court said in Thomas v. Railroad Company, 101 U. S. 71, 86, "To hold that they can, is, in our opinion, to hold that any act performed in executing a void contract makes all its parts valid, and *from the others.* If the consideration is deemed an entirely that the more that is done under a contract forbidden by law, the stronger is the claim to its enforcement by the courts."

"Contrary to these express decisions of the Supreme Court, the suit of the Baltimore and Ohio Railroad Company is a plain attempt to obtain the affirmative relief of injunction by virtue of void ordinances and a void contract, and omissions and actions alleged to constitute laches and ratification. Such a suit is without foundation.

"Nor can we agree, as held by the District Court, that the plaintiff, Baltimore & Ohio Railroad Company, is entitled to have a final decree for a permanent injunction in its favor on the ground that the city, the defendant, failed to press the cause for a hearing. The railroad company was the actor. The temporary injunction adjudged

nothing and had no effect except to stay the collection of the tax until the final decree. The decree of the District Court makes the deliberate failure of the complainant to press for a final decree equivalent to a final decree in its favor. Neglect of a plaintiff, the actor in the cause, to prosecute his case to final judgment may well result in its dismissal; but the neglect of the defendant who sought no affirmative relief, or the neglect of both parties to bring the cause to a final hearing is not a ground for granting affirmative relief against the defendant without a trial on the merits. Surely the defendant was guilty of no delay of which the plaintiff was not equally guilty. If the parties are equally guilty of delay, neither can avail itself of the delay of the other as laches. Marshall v. Meyer, 118 Iowa, 508, 92 N. W. 693, 694; Mays v. Morrell, 65 Oregon 558, 132 Pacific 714; 21 C. J. 215; Kansas City Southern R. Co. v. Boles, 88 Ark. 478, 115 S. W. 375, 378; Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251, 266. Relieving the plaintiff of the responsibilities and penalties of neglect to prosecute and imposing them on the defendant, is reversing the rule of law."

We do not believe that this court will permit such an inequitable proposition to stand as that by laches or acquiescence on the part of its officers a municipal corporation can be implied to have ratified a contract which it *at no time had power to make.*

ISSUE IV.

THE ACTION OF THE CITY IN ASSESSING AND LEVYING TAXES UPON THE PROPERTY OF THE RAILROAD COMPANY IN 1893 AND 1894 WAS NOT ILLEGAL AND DID NOT IMPAIR THE OBLIGATION OF CONTRACT IN VIOLATION OF SECTION 10, ARTICLE I, OF THE FEDERAL CONSTITUTION, THE CONTRACT OF EXEMPTION BEING ULTRA VIRES AND VOID.

Before a court can be asked whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment and some ground to believe that it has been impaired.

10 Federal Statutes Annotated (2nd Ed.) 962.

Before this court can be asked to determine whether the obligation of a contract has been impaired, it must be made to appear that there was a legal contract subject to impairment.

New Orleans v. Waterworks, 142 U. S. 79, 35 L. Ed. 943.

Clarksburg etc. Co. v. Clarksburg, 47 W. Va. 744, 35 S. E. 994, 50 L. R. A. 142.

A void franchise given by a municipal corporation is not such a contract the obligation of which is protected by this provision.

Pacific E. R. Co. v. Los Angeles, 194 U. S. 118, 48 L. Ed. 896,

Richmond Co. Gas Co. v. Middletown, 59 N. Y. 228,

Westminister Co. v. Westminister, 98 Md. 551, 56 Atl. 990, 103 A. S. R. 424, 64 L. R. A. 630,

Clarksburg Electric Light Co. v. Clarksburg, 47 W. Va. 739, 35 S. E. 994, 50 L. R. A. 142.

Where a corporation is created, and powers conferred, by public act, a man who enters into a contract with it which is clearly in excess of its powers as shown by the act cannot enforce the contract, for he is chargeable with knowledge of public laws, and therefore with knowledge of the powers of the corporation.

Clark on Corporations, page 174,

Smith v. Cornelius, 41 W. Va. 59, 30 L. R. A. 747, 23 S. E. 599,

McCormick v. Market Nat. Bank, 165 U. S. 538, 41 L. Ed. 817,

2 Morawetz, Priv. Corp. sections 621, 718.

To make a grant of a franchise to furnish water to a city made by its council such a contract as is protected by the United States Constitution, the council must have authority to make such grant.

Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341.

It is insisted that the company's rights are protected by the contract clause of the Federal Constitution. Before, however, that clause can be invoked, there must be a contract, and some act by the state, or by its creature, a municipal corporation, by which the obligation of that contract is impaired. If there is no contract, there can be no impairment of the obligation of contract. An *ultra vires* contract is no contract at all. It is obvious, therefore, inasmuch as the contract relied on by the company is invalid because ultra vires, the prohibitive clause of the Federal Constitution cannot be invoked.

Westminister Water Co. v. Westminister, 98 Md. 551, 56 Atl. 990, 103 A. S. R. 424, 64 L. R. A. 630.

Since the obligations which the constitution of the United States protects from impairment are such as exist by reason of contract, it follows that, as a basis for invoking the rule, there must be a valid contract possessing the essential element of assent. It is apparent that the Federal Constitution does not protect contracts which are invalid, or illegal; as, for example, a grant of privileges in excess of a city's powers, or an ultra vires contract of a corporation; or a nudum pactum.

6 Ruling Case Law 326.

Before this court can be asked to determine whether a statute has impaired the obligation of a contract, it should appear that there was a legal contract subject to impairment.

New Orleans v. Water Works Co., 142 U. S. 79, 35 L. Ed. 943.

The contracts which the constitution protects are those that relate to property rights, not governmental.

Stone v. Mississippi, 101 U. S. 814, 25 L. Ed. 1079.

In order to come within the provisions of the Constitution of the United States which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired but it must have been impaired *by a law of the State.* The prohibition is aimed at the legislative power of the state, and not at * * * the acts of administrative or executive boards or officers, or the doings of corporations or individuals.

New Orleans Waterworks Co. v. Refining Co., 125 U. S. 18, 31 L. Ed. 613.

A municipal ordinance not passed under supposed legislative authority, cannot be regarded as a law of the State within the meaning of the constitutional prohibition against state laws impairing the obligations of contract.

Hamilton Gaslight Co. v. Hamilton, 146 U. S. 258, 36 L. Ed. 963.

Therefore, we submit that the assessment and levy of taxes upon the property of the Railroad Company would not impair the obligation of contract contrary to the provisions of Section 10, Article I of the Constitution.

ISSUE V.

THERE WAS NO NECESSITY FOR THE CITY TO OFFER TO DO EQUITY.

Appellant would lead one to believe that the Parkersburg Branch Railroad Company and its predecessor in

title, the Northwestern Virginia Railroad Company, in all of their various transactions with the Town and City, received nothing from the municipality but the alleged exemption; that the alleged exemption was THE consideration which lead the various railroad companies to enter into their various contracts with the municipality. An investigation discloses that this is not true.

The real *raison d'etre* of the contract of June 8, 1855, is shown by the report of the Town President to the Council on July 13, 1855, that is to say, FOR THE ADJUSTMENT OF THE CONFLICTING TITLES TO FHE OHIO AND KANAWHA RIVER BANK IN FRONT OF SAID TOWN. (Printed record, page 22). That simple statement discloses the real point of the meeting of minds. That was the real contract.

The Northwestern Virginia was apparently afraid of its own title to the river banks for it conveyed "WITH SPECIAL WARRANTY ONLY * * * * all the right, title, interest and estate granted and conveyed to them * * * * by deed from John J. Jackson and others."

The contract of June 8, 1855, was a divisible contract. The main part of the contract was the settlement of the conflicting titles. The Northwestern Virginia conveyed to the Town (in substance) its right, title, interest, and estate to the Ohio River Bank which is, as it was then, just an ordinary river bank, overgrown with horseweeds, and not a piece of Paradise or a gold-mine, extending over a stretch of ordinary, narrow river-bank possibly five ordinary city blocks in length.

And upon the Town was imposed the restriction that this property must "be used exclusively for wharves, landings and other purposes connected with the use of the Ohio

and Little Kanawha Rivers." Parkersburg was then the western end of the Northwestern Virginia Railroad and it was to the railroad company's advantage to encourage river traffic upon which it could feed, and to saddle the burden of the upkeep of these wharves on the municipality. And it is significant that the railroad company attempted to control the rates of wharfage on "this wharf."

Besides this riverbank, the city obtained the railroad's promise to construct two wharves, one of which it did build, that near "the point." In 1870, the Parkersburg Branch Railroad Company when materials were at high prices following the Civil War, gave $7500 to escape building one of these wharves. Consequently, it is fair to assume that the wharf which was constructed prior to 1860 cost the Northwestern Virginia Railroad Company much less than $7500.

In effect, the railroad company received from the Town by virtue of this contract "the free and exclusive use and occupation" of the Little Kanawha River Bank which was in area about equal to the area retained by the town on the Ohio. Along this Kanawha River bank the railroad laid its tracks and upon it it built a depot which for about sixty (60) years constituted its and its successors, only freight depot, until recently when its successor built a great freight depot covering several city blocks upon neither of which it, nor its successors, have ever paid one penny of taxes to the municipality. Although this old depot is no longer used as such, it still stands, and the Little Kanawha Bank remains occupied by the B. and O.

But this was not all that the Northwestern Virginia received by the contract of 1855. It obtained further "the right to lay and use railroad tracks, with suitable switches and turnouts along and across such of the streets and al-

leys as THEY MAY DEEM NECESSARY to connect their stations and other improvements."

In the foregoing paragraph we have dealt with the main sub-division of the contract of 1855.

The attempt on the part of the town authorities to exempt the property of the Northwestern Virginia Railroad Company was simply an afterthought, an expression of good will. In reality it was no part of the contract.

Therefore, it may readily be seen that the contract of 1855 may be declared null and void as to the exemption, and yet the main part of the contract may be allowed to stand.

It is a well settled principle of the law of contracts that a contract is not rendered entirely void by reason of containing an illegal stipulation. There may be a recovery on the valid portions of the contract provided it is divisible. The doctrine of ultra vires recognizes a similar principle. It is that when a part of a divisble contract is ultra vires, but neither malum in se nor malum prohibitum, the remainder may be enforced unless it appears, from a consideration of the whole contract, that it would not have been made independently of the part which is void.

The divisibility or indivisibility of the consderation may usually be determined by ascertaining whether or not the plaintiff requires any aid from the illegal part of the transaction to assist him in the establishment of his case. *Therefore, if the illegal portion of the consideration is merely incidental to the contract, and after separating the legal part of the consideration from the illegal, there still remains a consideration, the contract will usually be given effect.* But where the sole object for the formation of the contract was the accomplishment of an illegal purpose, no part of the contract will be enforced.

It is important that the illegality and indivisibility of the consideration be distinguished from the validty of the promise. For if the consideration is valid and one or more of the promises given in consideration of it are illegal, the illegality of one or more of such promses will not avoid the rest, provided that those which are valid are severable from the others. If the consideration is deemed an entirety and a part thereof is invalid, the entire contract fails if there has been no apportionment made or means of apportionment furnished by the parties themselves. But where the entire consideration is lawful and the promisor undertakes to do two things, one lawful and the other unlawful, and they may be separated, the entire and legal consideration will uphold the lawful part of the contract.

1 Elliott on Contracts, sec. 240 (citing many cases).

If the contract is divisible in its nature and part only is ultra vires, the valid part of the contract is enforceable. Thus a contract with a water company is enforceable as to payment for water and hydrant rentals, though ultra vires as granting an exclusive privilege. So where a city has reached its limit of indebtedness a contract for the construction of a street, the city to pay the cost of paving intersections and to assess the cost of the rest of the street on the abutting property is invalid as to the former clause, but valid as to the latter.

2 Page on Contracts, section 1058.

But our friends, on the other side, side-stepping the propositions that the contract of 1855 in regard to the alleged exemption was ultra vires and void, and that, even if valid, it was personal to the Northwestern Virginia, say but what about our $7500 paid in 1870? Was that paid for exemption? No mention is made in the ordinances, other than 1855 of any exemption.

For this $7500 the Parkersburg Branch Railroad received:—

(1) The right ot build a bridge in the middle of one of the city's streets for a distance of approximately six blocks.

(2) The right "to close and appropriate to their exclusive use" St. Cloud Court Alley for the distance of one city block.

(3) The right to lay as many tracks across Green and Washington Streets, at the intersection of said streets, as they chose.

(4) $15000 to enable the railroad company to widen the street upon which the bridge was to be constructed, in order that said street would not be entirely blocked by said bridge for use as a street by the tax payers and citizens of the Town.

B. In reality the attempted exemption was what is sometimes called a "naked" exemption. That is, it was an exemption without any feature of commutation or consideration other than the construction of the railroad.

There are several reasons why the City is not obliged to offer to do equity.

1. THE RULE THAT HE WHO SEEKS EQUITY MUST DO EQUITY ONLY APPLIES WHERE A PARTY IS APPEALING AS ACTOR TO A COURT OF EQUITY IN ORDER TO OBTAIN SOME EQUITABLE RELIEF.

I Pomeroys Eq. Jurisprudence (3rd Ed.) sec. 386,
I Story's Equity Jurisprudence (14th Ed.) sec. 69.

The maxim binds any party who AFFIRMATIVELY seeks equitable relief.
16 Cyc. 141.

The maxim has no application to a defendant in an equity case who asserts a pure legal right to defeat the application of the plaintiff for equitable relief.
10 R. C. L. 395.

THE ACTOR in this case was the Baltimore and Ohio Railroad Company. It came into equity asking affirmative relief.

The prayer of its Bill (Record, page 10) is as follows:

"In tender consideration whereof your orator prays that the City of Parkersburg, and John W. Dudley, Sheriff of Wood County, may be made parties defendant to this bill, that they may be compelled to answer the same; that the said City and its officers and agents and the said John W. Dudley, sheriff as aforesaid, his deputies, agents, attorneys and all persons acting under him may be perpetually restrained and enjoined from levying and collecting said taxes and the interest claimed thereon by levy upon and sale of the property of your orator or by any other means or proceeding, and that your orator may have such other further and general relief in the premises as to equity may seem meet, and as in duty bound it will ever pray, etc."

The City of Parkersburg does not affirmatively seek equitable relief. The prayer of its answer (Record, page 58) is as follows:—

"Respondent now having fully answered, prays to be hence dismissed with its reasonable costs in this behalf expended. And it will ever pray, etc."

2. THIS MAXIM APPLIES ONLY WHEN THE RELIEF SOUGHT BY PLAINTIFF AND THE RIGHT DEMANDED BY DEFENDANT BELONG TO OR GROW OUT OF THE SAME TRANSACTION. IT HAS NO APPLICATION WHERE THE DEMAND OF THE DE-

FENDANT IS BASED ON A CONTRACT SEPARATE AND DISTINCT FROM THAT WHICH FORMS THE SUBJECT OF THE PLAINTIFF'S ACTION.
10 R. C. L. 395.

We have heretofore shown that the contract of 1855 was a divisible contract, and that the "contract" of exemption should be declared null and void, but that there is no necessity for declaring any other part of the contract null and void.

The Circuit Court of Appeals in regard to this question (Printed record, page 170) held:—

"The last position taken by the complainant is that the City of Parkersburg must abide by the void ordinances and contract until it offers to restore the consideration received from the railroad companies for the exemption. If the North Western Virginia Railroad Company had continued business and continued to own the railroad propety in Parkersburg and were the plaintiff here, it could set up in this equity suit that it was entitled to a return of the property known as the Jackson lots and the value of its use if that could be made without detriment to the city, or to payment of the value of the property to the city and interest. In the adjustment the North Western Virginia Railroad Company would be required to account for the value of all the benefits received by it in the transaction with interest, and for the taxes it should have paid for all the intervening years with interest. This we understand would be the result of the principle sanctioned in Louisiana v. Wood, 102 U. S. 294; Parkersburg v. Brown, 106 U. S. 487, 503; Chapman v. Douglas County, 107 U. S. 348, 360; Salt Lake City v. Hollister, 118 U. S. 256, 263; Pennsylvania Railroad v. St. Louis etc. Railroad, 118 U. S. 317, 318; Railway Companies v. Keokuk Bridge Co., 141 U. S. 371, 389; Luther v. Wheeler, 73 S. C. 83, 52 S. E. 874.

"But the property conveyed and the benefits conferred by the North Western Virginia Railroad Company on the

city was for the consideration of exemption of the North Western Virginia Railroad Company from its taxes. This promise of exemption though void was actually performed and the North Western Virginia Railroad Company was in fact exempted from taxation for the whole period of its existence after June 8, 1855, the date of the ordinance and contract, until its property was sold in February 1865. The city is now barred by the statute from recovery of these taxes. The North Western Virginia Railroad Company has therefore received all that the city council attempted to promise for the city in consideration of the conveyance to the city of the Jackson lots; and it has no claim against the city either legal or equitable for failure of consideration.

"It is equally evident that the Baltimore & Ohio Railroad Company has no valid claim. As we have seen, the ordinance and contract of June 8, 1855, even if they had been valid would have conferred no right of exemption on the Baltimore & Ohio Railroad Company, purchaser at the foreclosure sale. It follows that the Baltimore & Ohio Railroad Company, the plaintiff here, has no equity to require return of the Jackson lots conveyed by the North Western Virginia Railroad Company or an accounting of their value to the city.

"The ordinance of May 30, 1865, contains no statement of any consideration whatsoever going from the Baltimore & Ohio Railroad Company to the icty, and hence it may be left out of consideration.

"The ordinance of May 10, 1867, bears the title "An Ordinance to Widen Washington Street, and to Authorize the Parkersburg Branch Railroad Company to Extend Their Track Through the City to the Ohio River." Sections 1, 2 and 3 all relate to privileges and powers granted to the Baltimore & Ohio Railroad Company, and they are very valuable privileges and powers. None of them impose any duty from the Railroad Company to the city. By section 4 the railroad company is required to put in a wharf at the foot of Court Street as one of the conditions of the powers and privileges granted in the preceding sections of

the ordinance. It is a distinct and separate requirement of the railroad. Sections 5, 6, 7 and 8 relate entirely to the widening of Washington Street to sixty feet. Section 5 provides that it shall be widened to sixty feet. Sections 6 and 7 provide for the acquisition by condemnation of the land required for the purpose of the city. Section 8 provides that the land required shall be conveyed to the City; but it provides further that if the railroad company should determine to construct an extension on any of the land so condemned, then the land shall be conveyed to the railroad company with the provision that it shall leave a pass-way of seven feet and spaces between the piers on Washington Street free and unobstructed. Section 9 provides that the city shall issue its bonds for $15,000 to pay for the land so required and that the railroad company shall pay the remainder not met by the sale of the city bonds.

"From this statement it is evident that the railroad company received very valuable rights and privileges from the city. For these it assumed only two obligations, that imposed by section 4 to build a wharf at the foot of Court Street, and the other to pay for the land condemned any balance after the application of the proceeds of the city's bonds for $15,000. There is no allegation in either bill that the railroad company paid anything at all for the acquisition of the property. The only thing, therefore, that could possibly be regarded as a consideration by the railroad company for the many rights and privileges granted in the ordinance of May 10, 1867 was the undertaking to construct a wharf at the foot of Court Street. The ordinance amending the ordinance of May 10, 1867 provides for the payment of $7500 as the consideration of the release of the railroad company from the obligation to build the wharf at the foot of Court Street.

"With this analysis, reading in connection the ordinances of May 30, 1865, May 10, 1867, and the ordinance of March 15, 1870, amending the ordinance of May 10, 1867, it is evident that the obligation to build the wharf at the foot of Court Street, and the payment of $7500 for release from that obligation was not a consideration for exemption from taxation which is not mentioned, but for the

numerous privileges and rights specifically conferred on the railroad company by these ordinances. This is made all the more evident by the fact that section 3 of the ordinance of May 30, 1865, and the same section of the ordinance of May 10, 1867, declaring in force the ordinance of June 8, 1855, and the deed executed at the same time, relate exclusively to permission to the railroad company to use steam on their trains, and make no mention of tax exemption.

"We cannot construe these ordinances as expressing beyond doubt an intention to exempt the Baltimore & Ohio Railroad Company from taxation, and expressing that the $7500 paid in discharge of the obligation to build the wharf at the foot of Court Street was a consideration for an attempted exemption from taxation. Such a construction would violate the rule so well established that the power to exempt and the intention to exempt must be clear beyond doubt.

"Take, however, the contrary view and assume in favor of the plaintiff that the $7500 paid by the plaintiff March 15, 1870 was paid entirely as a consideration for the exemption from taxes. Give the plaintiff credit for the entire sum of $7500 and interest from March 15, 1870, as a valid equitable claim against the city in favor of the plaintiff. The city would have the clear equity to set off against this debt of $7500 the taxes and interest thereon owing by the plaintiff from February 15, 1865, the date when plaintiff acquired the railroad property, to January 1, 1894. The aggregate of these taxes for these twenty-nine years owing to the city and interest thereon would far exceed the $7500 and interest considered as a payment for exemption from taxation. Thus it plainly appears that the plaintiff has received in illegal exemption from taxes which it is now too late for the city to recover, much more than the consideration paid for the exemption; and that it has no legal or equitable claim against the city."

CONCLUSION.

As has been stated, no definite, express consideration

passed from the Railroad to the Town for the grant of tax immunity; this grant was involved with other grants to and from the parties interested. This grant of immunity may be eliminated entirely and yet the Railroad has the apparent advantage of the interchange. This mutual feature has been entirely ignored by appellant; it has treated these contracts as if they were unilateral except in so far as the tax immunity was involved, and has apparently conceived restitution to be an ex parte proceeding.

It must be apparent how difficult, if not impossible, it would be to restore the original status of the parties, even if the relation of the parties warranted such a process. But aside from this question it tends to indicate the correct determination of this controversy to contemplate the condition which would probably result in case the prayer of appellant is granted. It is unfortunate that the Court is denied the light which the thirty years that have elapsed since this suit was instituted would afford. From sources other than the record the Court may assume that great changes have taken place; that the Town of then is now a City, a City of wealth and industry; that the branch railroad as it then was has become one of the important links of one of the great national systems of railroads. The Court may also assume knowledge of the extensive holdings which a railroad requires in a large industrial community, in the way of yards, depots, stations and other facilities; the municipal protection it demands. This condition is better conceived when it is recalled that appellant is the only railroad which enters the City, and for this information we are indebted to the brief of appellant. And this being the case, we are not unwarranted in assuming that as long as appellant enjoys the freedom from competition which this tax immunity confers, Parkersburg will remain "a one railroad city." It may be fairly inferred that in order to take care of the increasing shipping of a grow-

ing industrial community the properties and facilities of the Railroad must likewise increase. And thus it results that when the Railroad acquires a property that has theretofore produced a revenue to the City, it becomes sterile; the tax burden which it formerly bore is not cancelled but must be assumed by others.

But it is not a question of the past thirty years that is involved. They have passed, and a beneficient statute of limitation has obliterated the burden they should have borne. It is not for the past that we are concerned; it is for the infinite future; that hereafter all property shall bear its equal burden of taxation. What is now done will be irrevocable. The perpetuation of the discrimination which appellant has enjoyed for the last seventy years is so potent for evil as to forbid the entrtainment of the thought. That which originated as an immunity has developed into an unjust and inequitable discrimination, and its continuance can only exaggerate the iniquity. We cannot believe that the Court will inflict the City with this evil, and it is unthinkable that this condition shall continue so long as the City shall stand and the Baltimore & Ohio Railroad Company and its successors exist.

We therefore respectfully submit that the decree entered in this cause on the 17th day of December, 1923, by th United States Circuit Court of Appeals for the Fourth Circuit should be affirmed, and that the petition for a writ of certiorari to said Circuit Court should be refused.

Respectfully submitted,
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Respondent.